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The Notion of Persecution in the 1951 Convention Relating to the Status of Refugees and its Relevance for the Protection Needs of Refugees in the 21st Century

Crepin, Mathilde

Awarding institution:
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**The notion of persecution in the 1951
Convention Relating to the Status of
Refugees and its relevance to the
protection needs of refugees in the 21st
century**

Thesis submitted for the degree of Doctor of Philosophy
in Law

Mathilde Manon Crépin

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ABSTRACT

The notion of persecution is a pivotal element of the definition of a refugee set out in the 1951 Convention Relating to the Status of Refugees (1951 Convention). Yet, this notion has been increasingly criticised because it has been deemed inadequate in the current geopolitical context. Therefore, the present thesis will explore whether the notion of persecution can adapt to the circumstances of refugees in the 21st century or whether a change of paradigm is needed in international refugee law.

In particular, it will be observed that persecution has never been defined in the 1951 Convention. Some authors have considered that the absence of authoritative definition was intentional to make the concept of persecution adaptable to its various changing forms. Whilst the lack of a definition indeed makes this notion flexible, it also encourages divergent interpretations in the jurisprudence. As a result, a principled approach is needed and, in that perspective, the present thesis will explore the propositions made by various authors for interpreting persecution in the current world.

The most widely accepted interpretive framework considers that basic human rights should be used as benchmarks for interpreting persecution. Although this narrative proposes objective and tangible standards of interpretation, it has been inconsistently applied in national jurisdictions and has been quite criticised by a number of authors. This thesis will analyse this human rights framework, as well as alternative models that have been more recently proposed for interpreting persecution. The benefits and limitations of these different models, and how they have been concretely applied in the jurisprudence of various countries will be assessed in order to identify the most suitable approach for interpreting the notion in the 21st century.

Finally, the limitations of persecution will be explored in order to precisely delineate the contours of the current definition of a refugee at the

international level. It will be argued that this notion is sufficiently flexible to adapt to a large number of forcibly displaced people in the present world, if properly interpreted. Whilst, the limitations of this notion are not ignored, it will be contended that the 1951 Convention remains, to a large extent, relevant in the current geopolitical circumstances whereas other forms of protection could be more appropriate for individuals who do not meet the criteria of the refugee definition.

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TABLE OF ABBREVIATIONS

Administrative Appeals Tribunal of Australia	AATA
Australia Refugee Review Tribunal	ARRT
Board of Immigration Appeal	BIA
Commission de Recours de Réfugiés	CRR
Common European Asylum System	CEAS
Convention on the Elimination of All Forms of Discrimination Against Women	CEDAW
Cour Nationale du Droit d’Asile	CNDA
Court of Justice of the European Union	CJEU
European Convention for the Protection of Human Rights and Fundamental Freedom	ECHR
European Court of Human Rights	ECtHR
European Asylum Support Office	EASO
Federal Magistrate Court of Australia	FMCA
Federal Court of Australia	FCA
Female Genital Mutilation	FGM
High Court of Australia	HCA
Human Rights Committee	HCR
Immigration and Refugee Protection Act (Canada)	IRPA
International Court of Justice	ICJ
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic Social and Cultural Rights	ICESCR
Internal Flight Alternative	IFA
Internally Displaced People	IDP
Intergovernmental Committee on Refugees	ICR
Internal Flight Alternative	IFA
International Humanitarian Law	IHL
International Human Rights Law	IHRL
International Refugee Law	IRL
International Refugee Organisation	IRO
Law of Refugee Status	LORS
Lesbian Gay Bisexual Transsexual Intersex	LGBTI

Membership to a Particular Social Group	MPSG
New Zealand Immigration and Protection Tribunal	NZIPT
New Zealand Supreme Court	NZSC
Non International Armed Conflicts	NIAC
Organization of African Unity	OAU
Qualification Directive	QD
Refugee Status Appeal Authority (New Zealand)	RSAA
Refugee Status Determination	RSD
United Nations	UN
United Nations High Commissioner for Refugees	UNHCR
UNHCR Executive Committee	EXCOM
United Nations Relief and Rehabilitation Administration	UNRRA
United States	US
Universal Declaration of Human Rights	UDHR
Vienna Convention on the Law of Treaties	VCLT
World Health Organisation	WHO
World War I	WWI
World War II	WWII

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Introduction

A) Background and context of thesis

‘The twenty-first century is proving to be the century of people on the move’. This observation was made by Antonio Guterres, the former United Nations High Commissioner for Refugees,¹ during a speech to the General Assembly of the United Nations on 01 November 2011.² On this occasion, he noted that, in the past few decades, an unprecedented number of people have been displaced on the international scene and, unfortunately, they have not received adequate assistance from recipient countries. For him, this situation was partly due to the fact that international refugee law instruments were not sufficiently protective of ‘people on the move’, thus leaving some grey areas as to who should receive international protection today.

The main instrument defining who is a refugee at the global level is the Convention Relating to the Status of Refugees³ adopted in 1951 (the 1951 Convention). It was drafted after the Second World War (WWII), when representatives of 26 countries⁴ decided to address the problem of refugees displaced by the conflicts in Europe. They agreed on the terms of a common definition, enshrined in Article 1(A)2 of the Convention. They stipulated, inter alia, that a refugee is a ‘person who owing to a well-founded fear of

¹ Antonio Guterres was the United Nations High Commissioner for Refugees from May 2005 until December 2015. He then became the United Nations Secretary General on 1st January 2017.

² Meetings Coverage, GA/SHC/4024, 1 November 2011, General Assembly, Third Committee, 38th Meeting of the Sixty-sixth General Assembly ‘21st Century Proving to be ‘Century of People on the Move’, Innovative Approaches Needed to Address New Patterns of Forced Displacement’ available at <https://www.un.org/press/en/2011/gashc4024.doc.html>.

³ Convention Relating to the Status of Refugees, Geneva 28 July 1951, entered into force 22 April 1951, No. 2545, UNTS Vol 189, 137.

⁴ The 26 countries were: ‘Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland (the Swiss delegation also represented Liechtenstein), Turkey, United Kingdom of Great Britain & Northern Ireland (UK), United States of America (US), Venezuela, Yugoslavia. The governments of Iran and Cuba were represented by observers’ Additionally, ‘At its second meeting, the Conference, acting on a proposal of the representative of Egypt, unanimously decided to address an invitation to the Holy See to designate a plenipotentiary representative to participate in its work. A representative of the Holy See took his place at the Conference on 10 July 1951’. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons by the UN General Assembly, 25 July 1951, A/CONF.2/108/Rev.1.

being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.⁵

In this definition, the plenipotentiaries raised the notion of persecution as a core criterion to determine who is a refugee, making it the ‘keystone’⁶ of the Convention. In spite of its pivotal role, the term persecution was not defined in any instrument at that time. This lack of clarification on the meaning of persecution did not raise major problems in 1951 because the interpretation of the notion was relatively straightforward. In this period, persecution was commonly perceived as a repressive act carried out by totalitarian or oppressive states. However, the evolving geopolitical context at the global level progressively called into question this approach. In particular, concerns arose as to whether persecution should be interpreted only in conformity with the initial political background of the Convention or whether it could have a flexible meaning, making the definition of a refugee more adaptable to the types of harm faced by the new ‘people on the move’.

This uncertainty surrounding the notion of persecution has led many commentators to consider that it was an archaic notion that was not adapted to the protection needs of refugees in the 21st century. In this sense, Guterres enumerated new displacement patterns that have emerged since WWII, such as ‘population growth, urbanization, climate change’, ‘food, water and energy insecurity’⁷ and that are not easily encompassed by the term persecution. He pointed out that these phenomena contributed to the emergence of new

⁵ Article 1 A (2) of the Convention Relating to the Status of Refugees (1951) in its entirety reads as follows: ‘As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national’.

⁶ Hugo Storey, ‘What Constitutes Persecution? Towards a Working Definition’ [2014] 26 International Journal of Refugee Law 272, 272.

⁷ Guterres (n 1).

conflicts and had not been anticipated by the plenipotentiaries in 1951, leaving some protection gaps on the international scene. Whilst he expressed some legitimate concerns regarding the application of the Refugee Convention today, other voices adopted a more optimistic view of the situation. They pointed to the rather flexible character of this instrument, considering that it could well adapt to the changing situations of refugees,⁸ if properly interpreted.

The lack of consensus on the interpretation of the notion of persecution appears, nowadays, problematic because it can lead to inconsistent applications of the 1951 Convention. This can in turn undermine the global system of asylum by encouraging political *detournements* of the refugee definition, creating legal uncertainty for asylum seekers and providing incentives for asylum shopping with possible destabilising effects on refugee flows. In order to avoid these pitfalls, host countries need to adopt sufficiently protective and consistent approaches to the notion of persecution. It remains, however, unclear from the plain text of international refugee law instruments how these interpretive difficulties should be tackled today.

B) Research question

The research question of the present thesis has addressed these issues by considering whether the concept of persecution, set out in the 1951 United Nations Convention Relating to the Status of Refugees, is adequate for the needs and priorities of refugees in the 21st century or whether a change of paradigm is ultimately needed in international refugee law? Given that criticisms against the adequacy of the Convention, and in particular the notion of persecution, have become commonplace, the present thesis has explored the ambit of this notion and assessed its limitations in the current context.

⁸ Schoenholtz Andrew I., 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century' [2015] 16 *Chicago Journal of International Law* 81; McAdam Jane, 'The Enduring Relevance of the 1951 Refugee Convention' [2017] 29 *International Journal of Refugee Law* 1; Hathaway James C., 'A global solution to a global refugee crisis', *Open Democracy*, 29 February 2016.

C) **Methodology**

This research has sought to advance and contribute to the literature on the notion of persecution in refugee law in order to answer the above concerns. The present thesis argued that the notion of persecution remains relevant nowadays if a principled interpretive approach of the notion is consistently applied in national contexts.

i- Sources used for the research

This thesis has based its methodology on a desk review of various sources. Primary sources were considered such as international, regional and national instruments as well as soft law documents from International Organisations and reports prepared by various bodies, essentially Non-Governmental Organisations. These sources were selected based on their relevance as well as recognised authority on the international scene. A thorough legal review of relevant case-law was also conducted. The cases considered in this thesis were found on various public databases through thematic searches. The challenges in finding adequate case law in these databases were however not overlooked. Such sources only provide published decisions and sometimes produce limited results (overlapping with other topics). Therefore, academic reviews of specific case law were also considered in order to obtain some complementary insights as to relevant jurisprudential trends. No attempts were made to receive unpublished cases from public or private bodies (such as lawyers or UNHCR) given the well-known principle of confidentiality applied by these entities and anticipated reluctance to share documents.

Additionally, secondary sources such as academic pieces of writing were relied upon. A selective approach was used in order to identify the sources that directly address the meaning of persecution through a legal perspective (rather than for instance sociological or cultural). In particular, a mapping of the scholarship was made in order to identify the crux of the debate regarding the relevance of this notion in contemporary contexts. Early

authors as well as more recent scholars were considered. This research has essentially focused on the most prominent and recognised scholars who addressed the notion of persecution in refugee law in order to circumscribe the theoretical debate to the approaches that have gained major traction amongst relevant stakeholders. The objective was to propose a practical contribution to the field rather than questioning the notion of persecution through a purely conceptual lens. However, at times, references were made to authors who have proposed original perspectives with limited influence in the academic arena or in the jurisprudence, but who nonetheless were found to shed some light on relevant aspects of the notion of persecution.

ii- Line of argumentation of the research

Based on the above sources, this thesis has first sought to establish the interpretive background of the 1951 Convention by defining the new geopolitical challenges that characterise forced displacements in the modern world. In order to better evaluate the interpretive scope of the notion of persecution, this research has then built on the existing literature and engaged in an extensive analysis of the scholarship to examine the various proposals made by many authors to interpret persecution. Other proposals brought forward by institutions of the European Union as well as the UN Refugee Agency (the United Nations High Commissioner for Refugees), were also considered. This academic review has allowed to define the terms of the interpretive debate. The purpose of this was to explore various interpretive schemes and test them against the current background of refugee claims in order to identify different aspects of the notion of persecution that pose major challenges in applying the 1951 Convention today.

This theoretical exercise was also accompanied by a practical overview of the case law in order to survey the current state of practice through a comparative legal perspective. This research essentially focused on countries that have robust refugee status determination (RSD) procedures. Although some countries in Africa and Latin America⁹ have recently

⁹Alice Edwards, 'Refugee Status Determination in Africa' [2006] 14 African Journal of International & Comparative Law 204; U.S. Committee for Refugees and Immigrants and Asylum Access Ecuador,

developed such processes, jurisdictions that have a long-standing jurisprudence on asylum were particularly considered, namely Canada, the United States of America (USA), Australia and New Zealand, as well as some countries of the European Union. For practical reasons, and also due to their particularly advanced case law on asylum, attention was mostly paid to a selective choice of countries of the European Union such as the United Kingdom (UK)¹⁰, France and Belgium.

The objective of this review was to understand how various interpretive models examined in the first chapters were used by decision makers. This study identified protection gaps in order to determine which developments are desirable. By drawing upon legal principles developed by scholars as well as refugee law practitioners, this research generally sought to identify adequate modes of interpretation that can be consistently applied for the adjudication of asylum claims at the global level. A relevant interpretive model was then defined through an inductive approach that takes as a departure point the circumstances of refugees and highlights the importance of intersectionality in determining protection needs, in particular in the context of new claims such as the ones of refugee women.

It was also found relevant to engage in a specific case study of gender-related claims because such claims particularly exemplify the current interpretive challenges and the difficulties for applying the notion of persecution in contexts that were seemingly not anticipated by the drafters of the 1951 Convention. A survey of feminist approaches to refugee law has also underpinned an analysis of the case law in order to adequately identify gaps in interpreting persecution in situations of gender-based violence.

Lastly, the limitations of the refugee definition and the notion of persecution were explored. Through an overall analysis of different jurisprudential trends assessed against the theories defined by legal scholars

Refugee Status Determination in Latin America: Regional Challenges and opportunities: The national systems of Brazil, Colombia, Costa Rica, Ecuador and Mexico, January 2013.

¹⁰ At the time of writing, the UK is still member of the EU in spite of ongoing discussions about the possibility of the country to leave the Union.

and a geopolitical analysis of the current displacement patterns, this research argued that the 1951 Convention remains an efficient tool for the protection of refugees, only if an adequate interpretation of the notion of persecution, in line with the needs and priorities of refugees in the 21st century, is given to the notion of persecution. In particular, it was contended that the primacy of the 1951 Convention should be re-asserted and that decision makers should go back to a more circumstantial understanding of persecution proposed by the United Nations High Commissioner (UNHCR) as it appears to be both sufficiently principled and protective of the needs of refugees nowadays.

D) Outline of research

In order to assess the scope of persecution and its relevance for modern refugees, a preliminary chapter first analysed the historical background of the 1951 Convention and the context of the emergence of persecution as a pivotal concept in international refugee law. This chapter demonstrated that persecution has been perceived to be a politically biased notion and that, when the definition was developed, the plenipotentiaries had a particular meaning in mind, adapted to the necessities and circumstances of their time. However, they were also aware of their inability to anticipate the multiple forms of persecution as they could arise in the future, and therefore, they intended to use a flexible term in order to make the refugee definition malleable. It was then observed that the interpretation of persecution had not posed any particular problems in the bipolar world of the cold war, but that interpretive challenges started to arise with the emergence of new displacement patterns in the 1980s/1990s. The characteristics of these new patterns were fleshed out in order to delineate the contours of the interpretive debate today.

The second chapter engaged in an in-depth analysis of the traditional interpretive frameworks that have been proposed by scholars in order to overcome the challenges in applying the notion of persecution to new refugees. These frameworks have generally relied on a basic human rights paradigm to define what amounts to persecution. In particular, Hathaway's

proposal that persecution should be understood as a sustained or systemic violation of basic human rights demonstrative of a failure of state protection was considered and evaluated against other models and contemporary refugee claims. Several other basic human rights models were considered through a critical perspective in order to identify their advantages and limitations. A more general analysis of human rights theories was undertaken in order to assess whether human rights standards shall be considered relevant benchmarks of interpretation and to what extent this should be case. It was then argued that basic human rights do constitute relevant interpretive references because they provide objective norms of interpretation. However, a formalist reliance on a basic human rights scheme entails the risk of adopting a restrictive approach, that, in addition, does not necessarily foster consistency amongst jurisdictions for various reasons that will be expounded in the thesis. It was then further demonstrated that additional theoretical frameworks might be needed to provide adequate interpretive guidance to decision makers.

The third chapter of the present thesis explored more recent interpretive schemes that have been developed in the past years and that proposed to enlarge the understanding of persecution beyond a basic human rights narrative. In particular, the definition provided by the Qualification Directive¹¹ (QD) of the European Union was analysed in depth as it sets a new interpretive paradigm. Proposals of other scholars were also evaluated as well as the general framework developed by the Refugee Agency (UNHCR). The benefits and limitations of these various theoretical frameworks were evaluated against each other through the same comparative approach adopted in the previous chapter. It was eventually argued that a holistic and inductive approach, factoring in human rights norms and the individual circumstances of refugees appears the best adapted to the

¹¹ Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/248 (Revised Qualification Directive).

protection needs of refugees whilst not contravening the initial intent of the plenipotentiaries.

After a comparative analysis of the different paradigms proposed for interpreting the notion of persecution, a practical overview of the jurisprudential applications of these models was undertaken in chapter four. This chapter observed that the basic human rights framework is the approach that has been the most widely adopted by the jurisprudence of various countries for interpreting persecution. However, it was argued that this interpretive framework has not fostered much consistency amongst, as well as within, jurisdictions because multiple modalities of this model have been applied by refugee law judges, yielding different outcomes of asylum claims. The aim of this chapter was to identify protection gaps in the way the definition of a refugee, and more particularly the notion of persecution, are interpreted in domestic case law in order to demonstrate how a more holistic approach, factoring in, but not restricted to, basic human rights, would be more desirable for a more relevant and consistent protection of refugees on the international scene.

Chapter 5 engaged in the case study of asylum claims based on gender-related forms of violence. The choice of a case study was deemed necessary in order to highlight the existence of major interpretive difficulties that exist for new caseloads that were not anticipated by the plenipotentiaries in the 1951 Convention. Gender-based violence, affecting refugee women who often face harm at the hands of non-state agents appeared to be a particularly cogent example of how the notion of persecution is sometimes restrictively applied although these claims have become more and more frequent. The share of refugee women in the world today is significantly higher than in previous decades and brings to the fore new concerns of modern societies, often related to the negation of harmful traditional practices or the rejection of traditional social mores. These forms of predicaments are particularly challenging when it comes to applying the notion of persecution because they were not apparently considered by the drafters of the Convention when they developed the refugee definition. However, they

correspond to the current protection needs of refugees and, as such, could be covered by the notion of persecution that was meant to be sufficiently flexible in that sense. An overview of feminist theories in refugee law was undertaken in order to identify major features of the protection needs of refugee women. This theoretical understanding of women's asylum claims was tested against the case law in order to argue that the current interpretive approaches, often based on a basic human rights narrative, obviate some circumstances of refugee women and need further development through a more holistic and circumstantial understanding of the conditions of women in certain social settings.

Lastly, after having engaged in a theoretical and practical *tour de table* of different interpretive schemes and identified adequate approaches that would make the 1951 Convention better suited to the needs and priorities of refugees in the 21st century, the last chapter explored the confines of the notion of persecution. Certain limitations to this notion were fleshed out to demonstrate that the 1951 Convention is not applicable in all circumstances of forcible displacement. It was, however, demonstrated that some countries have misinterpreted these limitations, in particular in contexts of mass influx. In these situations, countries have often avoided tackling interpretive challenges by resorting to complementary forms of protection, that generally result in lesser forms of protection, or sometimes in the denial of protection to individuals that would have otherwise fallen into the ambit of the 1951 Convention if a proper understanding of the notion of persecution had been adopted. It was therefore argued that an adequate interpretation of the notion of persecution remains needed, even in situations of large movements of populations and that the primacy of the 1951 Convention, over any other complementary protection scheme, should be strongly reaffirmed. In doing so, it was contended that the Convention remains relevant in a large number of contemporary refugee situations and that adequate protection can still be provided to refugees.

It was, however, acknowledged that the notion of persecution has some inherent limitations that cannot be overcome without entirely

contravening the initial intent of the drafters of the Convention. These situations cover contexts in which various types of hardship are not directly caused by identifiable human agents but rather by external situations, whereby it is difficult to ascribe responsibility to people and consider that some individuals or groups are more targeted or vulnerable than others. In this context, it is unlikely that the 1951 Convention will be applicable. It was, nonetheless, argued that these limitations do not necessarily mean that a change of paradigm is needed in refugee law or that the 1951 Convention is currently obsolete. This last chapter indeed contended that the Refugee Convention remains relevant to protect a large number of individuals currently displaced on the international scene, generally as a result of some form of human intervention, and that complementary protection schemes should be kept residual in these circumstances. Other forms of displacements, such as for instance displacement caused by climate change, might call for the application of other types of normative protection schemes as one single legal instrument will be unlikely to encompass the situation of all the ‘people on the move’ in the world. It is, however, beyond the purview of the present research to identify the forms of protection schemes that would need to be developed to cover forcible displacements purely caused by external events. It remains that further developments are needed in these areas.¹²

Whilst it was not denied that a change of paradigm might be eventually needed if displacement patterns continue to evolve and the features of the international community continue to change, it was argued that a sufficiently evolutionary and robust understanding of the notion of persecution will help to ensure the ‘enduring relevance’ of the 1951 Convention, at least in the current world.

¹² In that sense, see for instance the work of Alexander Betts who proposed to develop a soft law framework for the protection of vulnerable migrants in Alexander Betts, ‘Towards a “Soft Law” Framework for the Protection of Vulnerable Irregular Migrants’ [2010] 22 *International Journal of Refugee Law* 209.

Chapter 1: The notion of persecution: historical background and interpretive challenges

The international definition of a refugee was developed in 1951 in Europe in order to determine who was eligible to asylum in the aftermath of WWII. Whilst the primary intention of the drafters of the 1951 Convention was to better organise the delivery of international aid, the development of a generic definition set clear ‘boundaries or limits’¹ to the category of people who could receive assistance. Indeed, to define who is a ‘refugee’ is to restrict the number of people entitled to protection and to exclude those who do not meet the criteria of the Convention. In this sense, authors pointed out that the plenipotentiaries ‘privilege(d) particular concepts’² more than others to delineate the contours of the states’ international engagements and limit the number of people entitled to refugee status.

One might therefore wonder how refugeehood was conceptualised in this period and for which reasons. In fact, as noted by Juss, the fundamental question should not be ‘who is a refugee’ but ‘whose refugee’³ are we talking about and ‘why do we define [refugees] the way we do?’⁴ Understanding how the refugee definition was developed might shed some light on the scope of the 1951 Convention as well as the meaning of some pivotal concepts such as the notion of persecution.

In a first part (Part 1), this chapter will provide an overview of the historical context in which the 1951 Convention was drafted in an attempt to explain the reasons why the plenipotentiaries chose the current eligibility criteria to develop the refugee definition, and more particularly, why the notion of persecution was introduced as an essential concept in refugee law.

¹ Jean-Francois Durieux, ‘Three Asylum Paradigms’ [2013] 20 International Journal on Minority and Group Rights 147, 150.

² Sara E. Davies, ‘Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol’ [2007] 19 International Journal of Refugee Law 703, 705.

³ S. S. Juss, *International Migration and Global Justice* (Ashgate, Aldershot, 2006) Chapter 6, 198.

⁴ *ibid*, 199-200.

This will help to better evaluate the scope of this notion and to assess its relevance in the 21st century. It will be argued that in spite of some uncertainty surrounding the intention of the plenipotentiaries, it can generally be agreed that they intended to introduce a concept that could adapt to the emerging circumstances of refugees. The second part of this chapter (Part 2) will then present the challenges that exist nowadays for interpreting the concept of persecution in light of new situations of forced displacement and demonstrate that a principled legal framework is needed to ensure that the notion of persecution is applied in a sufficiently protective and consistent manner to the new circumstances of refugees.

Part 1) The emergence of the notion of persecution in international refugee law

The definition of a refugee is the outcome of a historical and political process that led the drafters of the 1951 Convention to define refugees based on their reasons for flight and to consider that only people at risk of being ‘persecuted’ should be granted refugee protection. This section will analyse the historical backdrop⁵ to the 1951 Convention in order to understand its basic foundations (A) and to shed light on the legal process that made the notion of persecution a pivotal element of the definition of a refugee in the 1951 Convention (B).

A) Legal developments from 1920 to 1951 and the progressive conceptualisation of who is a refugee

The concept of a refugee initially emerged in a number of European instruments in the early 1920s in order to designate individuals eligible for international protection. Before the First World War (WWI), people used to

⁵ B. S. Chimni, *International Refugee Law: a Reader* (2nd edn, Sage Publication 2002) 1. To Chimni, the historical instruments defining a refugee constitute ‘the historical backdrop against which contemporary definitions need to be considered’. On the critical relevance of the instrument of the League of Nations for setting the backdrop within which the 1951 Convention was drafted: James C. Hathaway, ‘The Evolution of Refugee Status in International Law: 1920-1950’ [1984] 33 *The International and Comparative Law Quarterly* 348, 349. To Hathaway, European countries ‘carefully establish(ed) the hallmarks of refugeehood’.

enjoy a certain freedom of movement in the world and, as such, defining a refugee was not a major concern for the reigning powers. However, during WWI, massive movements of populations took place on the continent and, given the high risk of destabilisation in the region, European countries decided to adopt a number of agreements in order to better organise the delivery of aid. New instruments were developed under the auspices of the League of Nations, to determine who was eligible for refugee status by referring to specific categories of people. For instance, a number of bilateral and multilateral treaties were created to protect individuals who had fled the consequences of the Russian revolution in 1917 and the problems arising out of the dissolution of the Ottoman Empire.⁶ Some other treaties covered different groups such as ‘Latvian refugees (...) in the territory of Ukrainian Socialist Soviet Republic’, ‘Greek refugees’, ‘refugees in Bulgaria’, ‘refugees coming from Germany’.⁷ Through these instruments, refugee law was understood as a response to the plight of certain people fleeing repressive state policies in a European context. It can be observed that, in this period, the notion of persecution was not mentioned in any of the League of Nations’ documents because refugees were categorised as specific groups of individuals depending on their origins. To Zarjevski, this approach was quite

⁶ Inter alia ‘Arrangement with respect to the issue of certificates of identity to Russian Refugees’, signed at Geneva, July 5th, 1922 League of Nations Treaty Series (LNTS) [1922], vol 13, 237-257; ‘Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees’ signed at Geneva, June 30, 1928, League of Nations Treaty Series (LNTS) [1929], vol 89, 47-52.

⁷ Inter alia, ‘Agreement regarding the repatriation of Latvian refugees who are at present in the territory of Ukrainian Socialist Soviet Republic’, signed at Moscow, August 3, 1921 League of Nations Treaty Series (LNTS) [1923], vol 17, 306-315, ‘Declaration relating to the settlement of Refugees in Greece and the creation for this purpose of a Refugees Settlement Commission’ signed in Geneva, September 29, 1923 League of Nations Treaty Series (LNTS) [1923], vol 20, 41-43 ; ‘Protocol relating to the settlement of Refugees in Greece and the creation for this purpose of a Refugees Settlement Commission’, signed in Geneva, September 29, 1923 League of Nations Treaty Series (LNTS) [1923], vol 20, pp. 29-39 ; ‘Additional Act to the Protocol of September 29, 1923, relating to the Settlement of Greek Refugees’, signed in Geneva, September 19, 1924, League of Nations Treaty Series (LNTS) [1924], vol 30, pp. 413-419 ; ‘Declaration relating to the Modifications made to the Protocol of September 29, 1923, with regard to the Settlement of Refugees in Greece, by the Additional Act of September 19, 1924’ signed in Geneva, September 25, 1924 League of Nations Treaty Series (LNTS) [1924], vol 30, pp. 1922-1924 ; ‘Protocol concerning the Settlement of Refugees in Bulgaria’ signed in Geneva, September 8, 1926 [1926], League of Nations Treaty Series (LNTS), vol 58, 245-257; ‘Convention relating to the International Status of Refugees’ signed in Geneva, October 18th, 1933 League of Nations Treaty Series (LNTS) [1935], vol 159, 199-217; ‘Provisional Arrangement concerning the Status of Refugees coming from Germany, and Annex’ signed in Geneva, July 4th, 1936 League of Nations Treaty Series (LNTS) [1936], vol 171, 75-87; ‘Convention concerning the Status of Refugees coming from Germany, with Annex’ signed in Geneva, February 10th, 1938 League of Nations Treaty Series (LNTS), vol 192, 59-81; ‘Protocol to the Provisional Arrangement and to the Convention respectively signed at Geneva on July 4th, 1936 and February 10th, 1938, concerning the Status of Refugees coming from Germany’, opened for Signature in Geneva, September 14th, 1939 League of Nations Treaty Series (LNTS) [1939], vol 198, 141- 145.

restrictive because the mandate of the ‘organizations founded by the League of Nations’ was limited ‘to precisely describe already existing categories of people’⁸ and did not rely on a generic definition.

The reasons for such approach were expounded by Hathaway. To him, the period from 1920 to 1935⁹ marked a phase when refugees were considered to be groups of individuals stranded outside their country of origin, and unable to migrate anywhere else. Then, from 1935 to 1939¹⁰, states adopted, what Hathaway termed a ‘social approach’, when refugees were seen as ‘helpless casualties of broad-based social or political occurrences’.¹¹ Even though, as Hathaway noted, there was a slight shift of paradigm between the instruments developed in both periods, it can be observed that all these documents generally adopted the same category-based method to determine who was a refugee.¹² Goodwin-Gill synthesised these approaches by stating that, before WWII, it was sufficient to be ‘someone a) outside their country of origin and b) without the protection of the government of a state’¹³ in order to be eligible to international assistance. These criteria were of course understood in the restrictive framework of the pre-defined categories.

The League of Nations was eventually dissolved at the outset of WWII and, as new groups of refugees appeared, the old refugee treaties became obsolete. Just before the beginning of WWII and in the aftermath of the Allies’ victory, the international community successively created, the Intergovernmental Committee on Refugees (ICR) in 1938, the United Nations Relief and Rehabilitation Administration (UNRRA) in 1943 and the International Refugee Organisation (IRO) in 1946 in order to provide

⁸ Delphine Zarjevski, *A Future Preserved, International Assistance to Refugees*, (Pergamon Press 1988) 12.

⁹ Hathaway (n 5) 362.

¹⁰ *ibid* 349. However in p. 361 of his article, Hathaway refers to a different time period, namely 1935 to 1938. There is indeed a one-year overlap transition from one phase to another.

¹¹ *ibid* 349.

¹² *ibid* 362: for instance, in 1935, the League of Nations developed a plan to issue a certificate of identity for individuals who had left the Saar territory after a plebiscite that resulted in the union with Germany: this remains a category approach to defining a refugee. See also Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3rd edn, OUP 2011) (n 2) at 16: they noted that the approach for defining a refugee remains group-oriented: ‘even when social and political upheaval was accepted as giving content and meaning to refugee definitions, these remained circumscribed by particular crises and linked to ethnic or national origin’.

¹³ Goodwin-Gill and McAdam, (n 12) 16.

assistance to refugees. They adopted new approaches to define who was a refugee. The first organisation, the ICR, was in charge of facilitating the emigration of victims of the Nazi regime from Germany and Austria and considered that only individuals from these countries were entitled to receive international protection.¹⁴ This new approach was rather innovative given that it identified refugees as groups of individuals who could receive assistance even in their own country of origin. It was however only limited to German and Austrian refugees and thus still adopted the previous category-oriented approach. In spite of these limitations, Hathaway noted that the ICR developed a new paradigm, defining refugees based on ‘personalized criteria of political opinion, religious belief and racial origin’.¹⁵ To Hathaway, the ICR announced the beginning of a new phase where refugees were considered in ‘individualist terms’.¹⁶

After the ICR, the mandates of UNRRA and IRO established new refugee definitions that emphasised this individualistic narrative as opposed to group approaches. Resolutions of the UNRRA council stated that the organisation is competent to provide material help to ‘displaced persons’¹⁷ and:

‘other persons who have been obliged to leave their country or place of origin or former residence or who have been deported therefrom, by action or activities in favour of the United Nations, or for the control of epidemics for the purpose of preventing the spread of such epidemics to United Nations areas or to displaced persons of United Nations nationality found in the particular enemy or ex-enemy area’.¹⁸

¹⁴ Hathaway (n 5) 370-371: Refugees were defined as ‘1. Persons who have not already left their countries of origin (Germany including Austria), but who must emigrate on account of their political opinions, religious beliefs and racial origin, and 2. Persons as defined in (1) who have already left their country of origin and who have not yet established themselves permanently’.

¹⁵ Ibid 371.

¹⁶ Ibid 350.

¹⁷ Appendix I, Resolutions on Policy of the Third Session of the Council, UNRRA Council Resolution 10, 4.

¹⁸ Appendix II, Resolutions on Policy of the Third Session of the Council, UNRRA Council Resolution 71, 7.

This definition was based on a generic definition rather than referring to predetermine categories, thus seemingly encompassing more individuals. The UNRRA definition was, however, quite complex and was later superseded by the IRO's constitution.¹⁹ The IRO constitution defined refugees as individuals belonging to specific groups but also through the enumeration of more general principles, such as the principle of alienage, the existence of reasons for forcible displacements, and exclusion considerations. The nature of harm prompting an individual's flight was not characterised, but a new term -persecution- was introduced to designate the objections that refugees could raise for not wanting to return to their country of origin.²⁰ Through this notion, the IRO further emphasised the personal aspect of refugeehood by pointing to the importance of their individual circumstances. Fischel observed that, although the definitional provisions of the IRO were quite complex, they 'represented a two-fold innovation'²¹ by individualising the term 'refugee', and 'listing (...) the reasons upon which persecution was

¹⁹ Annex I, Part 1, Section A of the Constitution of the International Refugee Organisation, 15 December 1946, United Nations Treaty Series, vol. 18. p.1: '1. Subject to the provisions of sections C and D and Part II of this Annex, the term "refugee" applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories: (a) Victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quislings or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not; (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not; (c) Persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.

2. Subject to the provisions of sections C and D and of Part II of this Annex regarding the exclusion of certain categories of persons, including war criminals, quislings and traitors, from the benefits of the Organisation, the term "refugee" also applies to a person, other than a displaced person as defined in section B of this Annex, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.

3. Subject to the provisions of section D and of Part II of this Annex, the term "refugee" also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of Nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.

4. The term "refugee" also applies to unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin. Such children, 16 years of age or under, shall be given all possible priority assistance, including, normally, assistance in repatriation in the case of those whose nationality can be determined."

²⁰ Ibid, "1. In the case of all the above categories (...) persons will become the concern of the Organisation [...] if they have definitely, (...) expressed valid objections to returning to those countries.

(a) The following shall be considered as valid objections:

(i) Persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations; (...)

(iii) In the case of persons falling within the category mentioned in section A, paragraphs 1 (a) and 1 (c) compelling family reasons arising out of previous persecution, or compelling reasons of infirmity or illness."

²¹ Jose Fischel H. De Andrade, 'On the Development of the Concept of "Persecution" in International Refugee Law' [2008] 2 Anuario Brasileiro de direito internacional 114, 120.

grounded'.²² More broadly, Steinbock noted that under the ICR, UNRRA and IRO regimes, refugees started being defined on the basis of their experiences, rather than based on their membership to a particular collectivity.²³ Hathaway also emphasised the individual dimension of these definitions by pointing out that, at that time, refugees were defined as people escaping from 'injustice or a fundamental incompatibility with the home state' in search of 'personal freedom'.²⁴ The personalisation of the definition of a refugee in this period coincided with the emergence of the notion of persecution in international treaties.

The development of various definitions of a refugee in the instruments predating the 1951 Convention demonstrated that different conceptions of refugeehood existed throughout the first half of the century. These conceptions were adopted in reaction to the events and political necessities of the time, and, therefore, were shaped by the geopolitical circumstances in which they emerged. According to Juss, this suggested that, 'by the time of the drafting of the 1951 Convention by the international community, there was no axiomatic reason why one particular approach should be favoured over another, since there were at least three different approaches that had been used in the space of a few decades'.²⁵ As such, it can be concluded that the approach adopted in 1951 for defining who a refugee is, reflected a certain political stance taken by the States Parties. Whilst it cannot be denied that the drafters of the 1951 Convention were motivated by genuine humanitarian concerns, it should not be ignored that these concerns were also tainted with the political interests of states that determined how refugeehood was conceptualised. The following will analyse more in detail the underlying premises of the 1951 refugee definition.

²² Ibid.

²³ Daniel J. Steinbock, 'Interpreting the Refugee Definition' [1998] 45 UCLA Law Review 733, 806. According to Steinbock '(b)efore 1938, international protection was usually given to groups of displaced or stateless persons described simply by national or ethnic origin, in other words, by category. In 1938, for the first time in the twentieth century, persons driven from their homelands to be given international aid were described in individual rather than categorical or group terms'.

²⁴ Hathaway (n 5) 350.

²⁵ Juss (n 3) 196.

B) Creation of the 1951 Convention and the emergence of the notion of persecution in the refugee definition

By determining who is a refugee through the designation of groups of individuals, the pre-1951 definitions were meant to provide temporary protection to specific categories of people until they could find durable solutions. However, by the end of WWII, as noted by some authors, states realised that the refugee problem was rather pervasive in Europe and that more categories of individuals would require assistance. As such it was decided that a permanent solution was needed.²⁶ A new refugee agency, the UNHCR, was established in order to ‘provide protection’ and ‘seek permanent solutions for the problem of refugees’. States also decided to create an international treaty for the protection of displaced people in Europe. For this purpose, the Secretary General of the newly formed United Nations proposed to agree on a new convention that would organise the assistance of ‘all persons without international protection’.²⁷ This proposal was rejected for being too inclusive, in particular by the Soviet Union and its allies who eventually refused to take part in the creation of a new instrument.²⁸

Hathaway observed that, as a result, the states that ended up drafting the Convention were ‘predominantly Western’²⁹ and, represented a relatively homogenous ideological bloc. This had considerable consequences on how the new refugee definition was conceptualised. The drafters of the Convention decided to define refugees as individuals who, as a result of the events occurring in Europe before 1951, were outside their country of origin, had a well-founded fear of being persecuted based on a Convention reason and were not able to avail themselves of the protection of their state of origin.

²⁶ Robinson Nehemiah, *Convention Relating to the Status of Refugees: Its History, Significance and Contents* (New York: Institute of Jewish Affairs, 1952) 6. Nehemiah stated that the Convention was the ‘expression of a conviction by the comity of nations that refugees are not a temporary phenomenon, which can be dealt with either by half measures or piece-meal, but is one requiring a concerted effort by all states concerned’. See also Rieko Karatani, ‘How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins’ [2005] 17 *International Journal of Refugee Law* 517, 531.

²⁷ James C. Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ [1990] 31 *Harvard International Law Journal* 129, 144.

²⁸ *Ibid*, 145.

²⁹ *Ibid*, 146.

An early commentator pointed to the comparatively broader scope of this new definition as opposed to the former agreements that were ‘related to a strictly limited groups of refugees’.³⁰

However, according to Hathaway, this definition remained quite narrow as he believed that it simply constituted ‘a compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk’.³¹ Similarly, numerous authors pointed that the 1951 Convention had an inherently restrictive scope. For instance, Chimni viewed the Convention as a Eurocentric document addressing only certain types of harm.³² Bhabha also considered that its ambit was very limited and unlikely to encompass numerous people in need.³³ In this sense, Chetail argued that the refugee definition was selective in nature.³⁴ These limitations were also pointed by Steinbock who, on a more acquiescing note, considered that the plenipotentiaries ‘sought to avoid the creation of a potential “blank check” that might be “cashed” by unknown multitudes’.³⁵ For the above authors, the drafters of the Convention established a definition that was intentionally restrictive at the beginning to limit their own engagement.

The notion of persecution was chosen in this specific context and was also perceived as restricting the refugee definition by designating only certain forms of harm through a biased understanding of who was a refugee. For instance, Hathaway stated that the state parties ‘brought to the drafting table their own ideological partisanship’,³⁶ as the notion of persecution only covered the plight of individuals fleeing civil and political harm at the hands of state authorities in the Soviet bloc and, thus, was convenient for Western states. He noted that, conversely, persons denied basic rights such as ‘food,

³⁰ Nehemiah (n 26) 9.

³¹ Hathaway (n 28) 133.

³² Chimni (n 5) 2.

³³ Bhabha, ‘Internationalist Gatekeepers? The Tension between Asylum Advocacy and Human Rights’ [2002] 15 Harvard Human Rights Journal 155.

³⁴ Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio-Marín (eds), *Human Rights and Immigration*, (OUP 2014) 19-72, 24.

³⁵ Steinbock (n 23) 738.

³⁶ Hathaway (n 28) 146.

health care, or education (i.e. the socio-economic rights, where the Western states [had] a poor record were) excluded from the international refugee definition'.³⁷ In this sense, he demonstrated that persecution was a 'politically partisan notion'.³⁸ Shacknove also observed that the Convention was a mere response to the 'European totalitarian experience [where] refugees were primarily [seen as] the persecuted victims of highly organized predatory states'. Bhabba argued that persecution 'was imported from the preceding international refugee regime as a familiar term and a useful Western tool, flexible enough to cover the circumstances of both victims of Nazism, and Soviet and other Eastern dissidents'.³⁹ For her, persecution was meant to exclude 'those forced to flee because of personal vendettas and private feuds, non-discriminatory economic duress, famine, or internal civil turmoil - in short those whose persecution is not based on some form of egregious systemic discrimination or rights violation'.⁴⁰ In line with the views that this notion was biased, Coles considered that the introduction of the pivotal concept of persecution in this context was designed to respond to the particular needs of individuals in Europe at a particular time only.⁴¹ Loescher also stated that 'the adoption of persecution as the central characteristic of the refugee was made to fit a Western interpretation as asylum seekers'.⁴² Bagaric and Dimopoulos further noted that 'despite its universal overtones, the 1951 Convention was limited by the fact that it protected mainly Europeans fleeing after the War'.⁴³ Finally, McAdam recently stated that the notion of persecution had an implicit political signification and was tied to forms of harm perpetrated by certain repressive states in Europe,⁴⁴ also highlighting

³⁷ Hathaway (n 28) 150. See also p 148: 'In the end, it was agreed to restrict the scope of protection in much the same way as UNRRA had done: only persons who feared "persecution" in the sense of being denied basic civil and political rights would fall within the international mandate. (Persecution as an attempt to restrict the scope of individuals protected). First, the persecution standard was a known quantity, having already been employed to embrace Soviet bloc dissidents under the IRO regime'. See also Karatani who considered that the definition of a refugee was established in order to protect people who fled the Eastern bloc in Rieko Karatani (n 26).

³⁸ James Hathaway and Michelle Foster, *The Law of Refugee Status*, (2nd edn; CUP 2014) 8.

³⁹ Bhabba (n 35) 172.

⁴⁰ Bhabba, *ibid* 167.

⁴¹ Gervase Coles, 'Approaching the Refugee Problem Today' in Gil Loescher and Laila Monaghan (eds) *Refugees and International Relations* (OUP, 1989) 373-410, 374-5.

⁴² Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993) 57.

⁴³ Mirko Bagaric and Penny Dimopoulos, 'Refugee law - time for a fundamental rethink: need as the criterion for assistance' [2003] 9 *Canterbury Law Review* 268.

⁴⁴ Jane McAdam, 'Rethinking the origins of persecution' [2014] 25 *International Journal of Refugee Law* 667, 671. Jane McAdam highlights the fact that persecution was implicit in the refugee concept

the strong political character of the notion of persecution at that time. As such, for many authors, persecution was a politically-charged notion that corresponded to the interests of the states that drafted the Convention at a certain time and designated sorts of predicaments suffered by victims of predatory European regimes.

In light of the foregoing, it can be argued that the current refugee definition is, indeed, the direct result of events occurring in Europe and neighbouring countries in the first half of the 20th century. Although the definition progressively changed from a category-oriented definition to a more generic one by introducing the notion of persecution as a pivotal element, it remained embedded in a particular regional, historical and cultural context.⁴⁵ The background of the 1951 Convention is significant in that it points to a discrete legal movement which aimed at providing assistance to only some populations in need and that was imbued with a political dimension.⁴⁶

These observations are, however, in tension with the progressive universalisation of the definition of a refugee and the emergence of new protection needs as the section below will demonstrate. The ability of the notion of persecution to adapt to new interpretive contexts became therefore questionable.

Part 2) Applying the 1951 Convention to new refugee situations: the interpretive challenge

In spite of the deep regional and political imprint of the 1951 Convention, the 1967 Protocol made the refugee definition universally

through the analysis of the drafting record of the international instruments in that period dealing with the protection of refugees.

⁴⁵ Andrew E. Shacknove, 'Who Is a Refugee?' [1985] 95 Ethics 274, 276. According to Shacknove, the 1951 Convention 'was a response to the European totalitarian experience when, indeed, refugees were primarily the persecuted victims of highly organised predatory states'.

⁴⁶ On this see, Michael Parrish, 'Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection' [2000] 22 Cardozo Law Review 223, 228. According to Parrish, after WWII 'the world community considered the specific geopolitical circumstances and decided to develop a legal definition of "refugee" that placed primary emphasis on only one of the possible motivations for flight: persecution'.

applicable. This has raised some interpretive challenges. Indeed, the nature of refugee movements has significantly changed since WWII, thus questioning the relevance of the 1951 Convention and more particularly the notion of persecution in a changing international society. The section below will analyse how the refugee definition has been universalised (A). It will be then considered how refugee flows have evolved since 1951 (B) in order to assess whether the notion of persecution is sufficiently flexible to be interpreted in light of these new displacement patterns (C). Finally, possible basis of definition will be considered in order to guide the interpretation of the notion in light of new circumstances of refugees (D).

A) Universalisation of the 1951 Convention

Although the 1951 Convention was not meant to provide protection to all people in need of international assistance over the world, some authors had pointed out that its content had an inherently universal character and could be used as a model for establishing a global system of protection.⁴⁷ This view aligned with the recommendation of the Final Act of the conference of plenipotentiaries, expressing the desire that the Convention be applied more extensively, depending on the will of member states. Indeed, the Final Act stated that the 1951 Convention should ‘have value as an example exceeding its contractual scope’.⁴⁸ The Act further expressed the hope that ‘all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides’.⁴⁹ This recommendation encouraged states to rely on the Convention for extending their assistance to a larger number people in need, thus emphasising the protection purpose of the 1951 Convention. This indeed suggested that, apart from the explicit temporal and

⁴⁷ Nehemiah indeed highlighted the inherent universal character of the Convention as he pointed out that whilst ‘all preceding Conventions referred to European refugees only’, ‘the present Convention can be applied to refugees from any part of the world’ in Nehemiah (n 26) 8.

⁴⁸ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons by the UN General Assembly, 25 July 1951 available at: <http://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html>.

⁴⁹ Ibid.

geographical limitations, there was a hope that the 1951 Convention could serve as a basis for developing an expanded system of protection. Goodwin-Gill noted that, until 1967, in practice, many states relied on the Final Act recommendation for providing assistance to individuals who had been forcibly displaced during some major world crisis, even after 1951.⁵⁰ It was, however, unclear whether this recommendation was meant to cover only individuals who met the criteria of the refugee definition after lifting the geographical and temporal limitations, or larger groups of people.⁵¹ Whilst this point remains uncertain, the recommendation of the Final Act nonetheless indicates that the refugee definition could also adapt to circumstances different than the pre-1951 events.

A few years after the end of WWII, the persistence and the emergence of new refugee crises⁵² led states to reconsider the scope of the Convention. Davies observed that, in the post-war period, the UNHCR had ‘grown increasingly frustrated with its limited mandate, with growing refugee problems in Europe and Africa that were beyond the technical reach of the Convention, and with a lower than expected number of accessions to the Convention, particularly amongst recently decolonised states’.⁵³ It was becoming clearer at this time, that the refugee problem was pervasive, beyond the confines of Europe. In light of this situation, Juss noted that ‘for the Refugee Convention to remain relevant and apply as a universal treaty, it had to change its Eurocentric orientation’.⁵⁴ As a result, states adopted a protocol in 1967 that lifted the geographical and temporal limitations of the refugee definition,⁵⁵ and made the 1951 Convention a universally applicable treaty.

⁵⁰ Goodwin-Gill and McAdam (n 12) 36. See also David (n 2) 703. According to Davies the need to provide a broader protection to refugee was already clear in the 1950s.

⁵¹ Goodwin-Gill and McAdam (n 12) 36 at footnote 110.

⁵² Astri Suhrke, ‘A Crisis Diminished: Refugees in the Developing World’ [1993] 48 *International Journal*, No 2 (Migrants and Refugees) 215, 217: ‘The narrowly European orientation of the international refugee regime established in the immediate aftermath of World War II was not seriously challenged until the early 1960s. Then, suddenly, Africa moved to the fore with many nearly simultaneous outflows of population which arose from decolonisation struggles in Algeria (i959ff), Zaire (i960), Rwanda (ig63), and Portuguese Africa (circa 1961) as well as the increasingly violent confrontation between north and south in Sudan (circa 1963)’.

⁵³ Davies (n 2) 703.

⁵⁴ Juss (n 3) 187.

⁵⁵ UN General Assembly, Protocol Relating to the Status of Refugees, 4 October 1967, No.8791 UNTS 606, 267: Article 1(2) Protocol Relating to the Status of Refugees: ‘2. For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of Article I of the Convention as if the words “As a result of events

The 1967 Protocol, however, did not revise any of the other provisions of the Convention. Given these minimal changes, Hathaway considered that the Protocol failed to substantively reform the Convention. Hathaway observed that even if the Protocol universalised the refugee definition, ‘only persons whose migration is prompted by a fear of persecution in relation to civil and political rights come within the scope of Convention-based refugee protection’.⁵⁶ This meant ‘that most Third World refugees [would] remain de facto excluded, as their flight is more often prompted by natural disaster, war, ‘or broadly-based political and economic turmoil than by “persecution”, at least as that term is understood in the European context’.⁵⁷ Due to that, Hathaway called the reform operated by the 1967 Protocol a ‘pyrrhic victory for the less developed world’.⁵⁸ For him, the Protocol had not been able to correct the strong Western-centric bias of the Convention and to make it relevant to the evolution of forced migration patterns. Davies expressed the same concerns.⁵⁹ More particularly, she noted that the 1967 Protocol did not lift the condition of ‘political persecution’ which was, according to her, a major impediment for providing protection to ‘larger numbers of people fleeing generalised situations of violence and abuse’.⁶⁰ The type of reform carried out by the 1967 Protocol therefore raised major concerns regarding the fate of the 1951 Convention. Indeed, the Protocol’s failure to provide substantive reform to the refugee definition questioned the relevance of the 1951 Convention to tackle the problem of refugees in the post-cold war world. In the words of Juss, ‘one of the perennial questions of modern-day refugee law is whether the 1951 UN Convention remains applicable to today’s global migration crisis’.⁶¹ In order to better assess the extent to which the refugee definition could still be relevant today, it is first important to consider the new nature of the emerging global migration crisis.

occurring before 1 January 1951 and...” and the words “...as a result of such events”, in article 1 A (2) were omitted’.

⁵⁶ Hathaway (n 28) 162.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ See discussion on this, in Davies (n 2) 708.

⁶⁰ Ibid 728.

⁶¹ Juss (n 3) 197.

B) New refugee situations

i- Persecution: the absence of interpretive challenges during the cold war period

Widol de Wenden observed that the interpretation of the definition of a refugee and more particularly of the notion of persecution did not cause particular difficulty until the end of the cold war period. She explained that, at that time, refugees escaping from a state belonging to the opposite bloc were automatically granted asylum because the definition of a refugee was mainly used as a political tool against enemy states. As a result, the understanding of the concept of persecution depended simply on the political views of the asylum country. In order to illustrate her statements, she mentioned the practice of the USA, where victims of the Cambodian, Vietnamese or Laotian regimes were systematically granted asylum in the 1970s, simply because those countries were affiliated to the Soviet bloc. This was done as the expression of a political stance and, in this context, judges in the USA did not have to assess whether the forms of harm claimed by the asylum seekers amounted to persecution.⁶²

Other scholars supported the view that, at that time, refugee flows were mainly perceived through the cold war polarity. For instance, Kennedy stated that persons eligible for international protection were defined ‘with political considerations in mind’.⁶³ Suhrke also highlighted the political nature of forced displacements by stating that, during this period, refugees represented ‘a propaganda victory for the other side, which could claim, [...] that these people were voting with their feet’.⁶⁴ This mindset prevailed throughout the cold war. In 1980, a debate was launched at the United Nations on the root causes of displacements and unfortunately states again adopted a politically biased view of the situation. Western states generally claimed that the ‘mass outflows were caused by totalitarian regimes in the countries of

⁶² Catherine Withol de Wenden, *La Question Migratoire au XXI^e Siècle: Migrants, Réfugiés et Relations Internationales*, (2nd edn: Science Po Les Presses, Paris, 2013) 143.

⁶³ David W. Kennedy, ‘International Refugee Protection’ [2014] 8 Human Rights Quarterly 1, 3

⁶⁴ Suhrke (n 64) 223.

origin which violated human rights’ while ‘socialist and many developing countries responded by citing colonialism, global economic inequality, and apartheid as the underlying causes of social conflict and related migrant outflows’⁶⁵ thus, perpetuating the ideological dichotomy in this period.

Given the strong political use of refugee law during the cold war, the interpretation of the notion of persecution did not raise particular juridical debate amongst Western jurisdictions. As stated by Hathaway, ‘Western states, which initially saw the admission of refugees to be consistent with their more general political goals, found the persecution-based definition to be quite capable of embracing virtually all emigrants from the socialist states of Europe’.⁶⁶ This situation eventually changed in the 1990s, when the system of political bipolarity collapsed. In a new emerging world governed by multilateralism, political affiliations started having a lesser, or at least a different, impact on the nature of protection afforded to refugees.

ii- New displacement patterns

Refugee claims progressively changed with the evolution of international relations at the end of the cold war. The demise of an old world sparked new conflicts in different countries and created new displacement patterns.⁶⁷ For instance, Suhrke observed that, in this period, old protracted refugee crises in Asia and Latin America slowly came to an end as ‘new flows emerged’.⁶⁸ He noted more specifically, that new forms of violence emerged in central Asia and the Caucasus⁶⁹ and various conflicts erupted in Africa, such as for instance Somalia.⁷⁰ These crises created new refugee flows and the extent of these new refugee movements was wider than before. Instead of remaining in their own region, as was mostly the case during the cold war,⁷¹

⁶⁵ Ibid, 219.

⁶⁶ Hathaway (n 28) 169.

⁶⁷ Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (OUP 2011) 32.

⁶⁸ Suhrke (n 54) 215.

⁶⁹ Ibid 216.

⁷⁰ Ibid 215.

⁷¹ Betts and Loescher (n 79) 48: ‘During the Cold War, the proxy conflicts of the 1970s, in which the superpower rivalry between the United States and the USSR was played out in the developing world, led to massive displacement in the Horn of Africa, Southern Africa, Indochina, South Asia, and Central America’.

refugees started travelling longer distances due the ‘liberalisation of the economies at the global level, increasing interdependence among nations [and] new infrastructures of transportation’.⁷² In particular, Audebert and Dorai pointed out that, in this period, ‘flows of refugees [...] intensified as their composition [...] diversified and their dynamics [became] more complex’.⁷³ The UNHCR also observed that globalisation progressively created the ‘cultural and technical conditions’ for the mobility of refugees,⁷⁴ leading to the intensification of refugee movements. Following the emergence of these new trends, the number of asylum applications surged in developed countries. Arboleda and Hoy noted that, in the early 1990s, Western jurisdictions started dealing with ‘a greater number and diversity of Third World asylum seekers’.⁷⁵ A similar observation was made by other authors such as Shoenholtz,⁷⁶ Betts and Loescher.⁷⁷

The intensification of refugee movements was also accompanied by a diversification of the nature and causes of displacements. As highlighted by the UNHCR, recent ‘issues which the original delegates [...] never even considered’⁷⁸ emerged on the international scene. For instance, Kalin highlighted the emergence of new claims based on persecution perpetrated by non-state actors.⁷⁹ In particular, Audebert and Dorai pointed to the increasing

⁷² Cedric Audebert and Mohamed Kamel Dorai (edn), *Migration in a Globalised World, New Research Issues and Prospects*, (Amsterdam University Press 2010) 7.

⁷³ Audebert and Dorai *ibid* 8.

⁷⁴ UNHCR, ‘The State of the World's Refugees 2006, Human Displacement in the New Millennium’ (Geneva, 2006) 12.

⁷⁵ Eduardo Arboleda and Ian Hoy, ‘The Convention Refugee Definition in the West: Disharmony of Interpretation and Application’ [1993] 5 *International Journal of Refugee Law* 66, 67.

⁷⁶ Andrew I. Schoenholtz, ‘The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century’ [2015] 16 *Chicago Journal of International Law* 81, 86-85 and 88.

⁷⁷ Betts and Loescher (n 73) 42.

⁷⁸ UNHCR, ‘The Refugee Convention at 50’, Editorials (Geneva 2001), available at: <http://www.unhcr.org/news/editorial/2001/7/3b4c06f0d/refugee-convention-50.html>. See also on this, the comments made by Messina, in Claire Messina, Refugee ‘Definitions in the Countries of the Commonwealth of Independent States’ in Frances Nicholson and Patrick Twomey (edn) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 136-150, 136: ‘The collapse of the Soviet Union resulted in population displacements of an unprecedented scale and complexity. [...] The complexity [of refugee flows] is a result of a unique intermingling of pre-existing internal flows turned international [repatriation, labour migration]; of new flows, whose typology is well known to the international community [refugee flows, flows of internally displaced persons, illegal migration, ecological migration, return of demobilised troops]; and of new flows on which little or no international experience exists [return of formerly deported peoples].’

⁷⁹ Walter Kalin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’ [2001] 15 *Georgetown Immigration Law Journal* 415, 415: According to Kalin: ‘the nature of persecution is changing [...]. Although statistics are not available, it is highly likely that the majority of today's refugees are fleeing dangers emanating from non-state agents’.

proportion of women in the migration flows,⁸⁰ leading to the appearance of new sorts of asylum requests based on gender-based violence.⁸¹ Hoepfner noted more generally that asylum applications relating to harm perpetrated by members of the refugees' community, and occurring in the private sphere, became more common at the turn of the 1990s.⁸² Other forms of claims that challenged traditional practices and social mores also became more frequent⁸³ as well as claims linked to types of collective violence or violence exerted at the hands of criminal gangs or caused by private vendettas.⁸⁴ In parallel to these evolutions, the UNHCR started identifying some emerging trends amongst the asylum seekers' profiles. For instance, in its 2016 annual report, the Refugee Agency noted that the number of unaccompanied children seeking asylum had considerably augmented in the past decades, reaching an unprecedented peak in 2015.⁸⁵ On a different note, Betts and Loescher pointed to 'the emergence of new transnational threats linked to terrorism and the environment'.⁸⁶ The emergence of new displacement patterns involving mass-influx situations, natural disasters and climate change as well as mixed flows of persons leaving their country was also pointed out by Feller as posing an interpretive challenge to the notion of persecution.⁸⁷ The above are only few examples of new forms of displacement that progressively emerged at the turn of the century, causing refugee applications lodged in Western jurisdictions to be more varied than before.

Further to this, it should be noted that the emergence of new displacement patterns took place in a global society, where human rights

⁸⁰ Audebert and Dorai (n 74) 77.

⁸¹ Florian Francois Hoepfner, *L'Evolution de la Notion de Réfugié*, Publication de la Fondation Marangopoulos pour les Droits de l'Homme, (Série 18, Paris Pedone, 2014) 314. Hoepfner observed that new types of asylum applications based on sexual orientation started being progressively lodged in European jurisdictions in the mid 1980-90s and became even more significant in recent decades. See also p 268.

⁸² Ibid.

⁸³ Ibid 265-312. Hoepfner noted the emergence of new claims related to harmful traditional practices; 314-332 to domestic violence; and at 333-365 to sexual violence.

⁸⁴ UNHCR, 'Guidance Note on Refugee Claims Relating to Victims of Organized Gangs', 31 March 2010.

⁸⁵ UNHCR, 'Global Trend, Forced Displacement 2016, 19 June 2017', available at <http://www.unhcr.org/en-my/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html>, 47.

⁸⁶ Betts and Loescher (n 73) 2.

⁸⁷ Erika Feller, 'The Refugee Convention at 60: Still Fit for Its Purpose? Protection Tools for Protection Needs' in Susan Kneebone, Dallal Stevens, Loretta Baldassar (eds) *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge Research in Asylum, Migration and Refugee Law 2015).

progressively became a central concern of geopolitical relations.⁸⁸ In this situation, it appeared that individuals started developing an increased sense of rights entitlement, which led Streeck to point to the emergence of a growing popular discontent in the globalised world. According to him, this movement announced the ‘return of the repressed’.⁸⁹ This larger sense of rights entitlement can be perceived as further contributing to the increasing diversity of refugee claims. As per the words of Antonio Gramsci, Streeck considered that the world is currently facing an ‘interregnum’ period, namely ‘a period of uncertain duration in which an old order is dying but a new one cannot yet be born’.⁹⁰ The old refugee order, when individuals were fleeing repressive state policies on account of their race, religion or political opinion seems to have been gradually replaced by a new order where forced displacements occur at a larger scale and for a broader variety of reasons. The needs and priorities of refugees are, therefore, changing and new vulnerabilities that were not anticipated by the drafters of the Convention have been progressively brought to light.

Interpreting the notion of persecution in this context raises more ambiguity than in the politically polarised world of the cold war. A transition from a political application of the notion of persecution towards a more judicialised interpretation is therefore needed. This transition has gradually taken place thanks to the development of jurisprudential trends that have provided some relevant insights to define persecution and that have been encouraged by the work of scholars in this field. However, in light of new issues that have now become major problems at the global level,⁹¹ interpreting the notion of persecution remains increasingly contentious. For instance, the relevance of this notion has even been questioned through the emergence of regional definitions of a refugee that squarely ignore the

⁸⁸ Scott Sheeran and Sir Nigel Rodley *Routledge Handbook of International Human Rights Law* (Taylor and Francis 2014) 18: ‘Over time, human rights have become a recognised code of conduct, making their way into a majority of contemporary constitutions and providing a standard for relations between the state and the citizen. In the 1990s, human rights were advancing to the centre of international relations’.

⁸⁹ Wolfgang Streeck, ‘The Return of the Repressed’, [2017] 104 *New Left Review* 5.

⁹⁰ *Ibid* 20.

⁹¹ *Ibid*.

concept of persecution.⁹²

This poses the question whether the notion of persecution is still useful to address the plight of millions of displaced people or whether it is sufficiently flexible to fit the current circumstances of refugees.

C) Persecution: a malleable term?

Whilst the notion of persecution has clearly been imbued with a certain political meaning as argued above, one might wonder whether it could be applied in the context of new displacement patterns in order to make the 1951 Convention relevant to contemporaneous problems of refugees. On this point, it is noteworthy that the notion of persecution is rather vague and, therefore, open to various interpretations. As a result, a risk of inconsistent approaches is significant. This could in turn undermine the coherence of the overall regime of international protection and provide incentives for ‘asylum shopping’.⁹³ Shoenholtz, in particular, lamented that some countries had adopted very restrictive interpretations of the refugee definition⁹⁴ whilst others adopted a more extensive view, thus creating major disparities amongst asylum systems.⁹⁵

The extent to which the notion of persecution can be interpreted is therefore questionable. To answer that question, it should first be pointed out that the plenipotentiaries have not provided any explicit limitations to this notion. Not only there is no definition of persecution in the 1951 Convention, but there is also barely any guidance in the *travaux préparatoires* of the Convention.⁹⁶ Different views have been expressed as to the reasons for this

⁹² Organisation of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Convention), 10 September 1969, 1001 UNTS. 45, and Cartagena Declaration on Refugees, (adopted on 22 November 1984) OAS Doc. OEA/Ser.L/V/II.66/doc.10, 190 (Cartagena Declaration). These issues will be explored in details in chapter 6.

⁹³ UNHCR, ‘The State of the World’s Refugees’, 1996 available at: <http://www.unhcr.org/3eb7ba414.pdf>, p 8.

⁹⁴ Schoenholtz (n 78) 88.

⁹⁵ Ibid 121.

⁹⁶ Steinbock (n 23) 809. See also Paul Weis, *The Refugee Convention, 1951. The Travaux Préparatoires Analysed with a Commentary by the Late Dr Paul Weis*, (CUP 1995) 8.

lack of guidance.⁹⁷ In particular, McAdam argued that the political dimension of the notion of persecution was so clear to the plenipotentiaries that they did not feel the need to introduce a definition.⁹⁸ Her view aligned with Betts' contention that the creators of the 1951 Convention 'did not anticipate that its obligations would be spread to the rest of the world'.⁹⁹ Although Betts acknowledged that the refugee definition was meant to have a certain flexibility, he believes that the plenipotentiaries did not foresee extensive interpretations of the Convention outside the European context. To him, their choice of persecution as a central element of the definition has, in fact, been a bar to extensive applications of the 1951 Convention.¹⁰⁰ In contrast with these authors, other commentators considered that, from the outset, even though the plenipotentiaries had a certain meaning in mind, they were aware of their inability to anticipate the diverse forms that persecution might take in the future and, therefore, they wanted to make persecution a flexible notion that could evolve depending on the changing conditions of refugees.

For instance, Grahl-Madsen argued that the drafters of the Convention did not define persecution as they wanted 'to introduce a flexible concept which might be applied to circumstances as they might arise'. To him, it looked like the plenipotentiaries had 'capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men'.¹⁰¹ His view was also shared by Chimni who stated that the plenipotentiaries 'deliberately left the meaning of persecution undefined as it was an impossible task to enumerate in advance the myriad forms it might assume'.¹⁰² Chetail also considered that the lack of definition was intentional, because the drafters wanted to introduce a 'concept flexible enough to encapsulate any possible future forms of mistreatment'.¹⁰³ Chetail further argued that the drafters of

⁹⁷ UNHCR, 'Note on The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees' [2001] 20 Refugee Survey Quarterly 1 at [16].

⁹⁸ McAdam (n 46).

⁹⁹ Alexander Betts, *Survival Migration* (Cornell University Press, 2013) 13.

¹⁰⁰ Ibid.

¹⁰¹ Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden, A. W. Sijthoff, vol. I, 1966) 193.

¹⁰² Chimni (n 5) 4.

¹⁰³ Chetail (n 35) 26. On the notion of flexibility, Lambert also considered that the 'drafters of the Refugee Convention opted for an open-ended and flexible approach to the concept of persecution' in Helene Lambert, 'The conceptualisation of 'persecution' by the House of Lords: Horvath v. Secretary of State for the Home Department' [2001] 13 International Journal of Refugee Law 16, 18.

the Convention simply wanted to relinquish the meaning of persecution ‘to the subsequent interpretation of each state party’.¹⁰⁴ Hathaway’s position on this issue is a little bit more ambiguous. As previously noted, he contended in 1990 that the notion of persecution had a strong political imprint in the mind of the plenipotentiaries and did not detect any intention on their part to develop a malleable concept. However, he adopted a more nuanced view in his seminal book, *The Law of Refugee Status* (LORS) in 1991 (and subsequent editions), as he explicitly stated that the plenipotentiaries did not define persecution because they considered that it was impossible to enumerate ‘in advance all of the forms of maltreatment that might legitimately entitle persons to benefit from international protection’.¹⁰⁵ Whilst this does not directly contradict his earlier contention, it nonetheless puts a greater emphasis on the malleable character of the notion as opposed to its political character.

In an attempt to reconcile different views, the UNHCR drafted a note on the interpretation of Article 1 of the 1951 Convention, observing that ‘whatever the reasons, the fact that the Convention does not legally define persecution is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term’.¹⁰⁶ Whether these types of persecution were meant to relate to forms of harm perpetrated by oppressive states is unclear. In any case, the different positions on the reasons for the absence of a definition are both reconcilable with the fact that the absence of definition of persecution allows for the term to be interpreted in an evolutionary manner. This view appears to now be the dominant one in national courts.¹⁰⁷ For instance, even though McAdam argued that the notion of persecution was meant to respond to the specific needs of certain refugees who fled political forms of harm, she

¹⁰⁴ Ibid 26.

¹⁰⁵ Hathaway and Foster (n 39) 182.

¹⁰⁶ UNHCR (n 99).

¹⁰⁷ *Ram v. Minister for Immigration and Ethnic Affairs and the Refugee Review Tribunal*, (1995) 130 ALR 314 FCA (27 June 1995) at [7]: ‘It seems to me that those who framed the provision wisely chose broad expressions, which it is not the court’s task to constrict’. Similar view is expressed in: *Hassan Adan and Others v. Secretary of State for the Home Department*, [1997] 2 All ER 723, CA, United Kingdom: Court of Appeal (England and Wales), 13 February 1997; *Sepet v Secretary of State for the Home Department*, UKHL 15 [2003] 1 WLR 856 United Kingdom: House of Lords, 20 March 2003.

eventually admitted that the 1951 Convention proved to have an ‘enduring relevance’.¹⁰⁸ To Sztucki, although the Convention was a ‘cold war product’,¹⁰⁹ ‘in the course of time it has lost its primarily cold war and Eurocentric character’.¹¹⁰ He considered that although the notion of persecution emerged in a specific context, it remains open to ‘a wide range of interpretation’.¹¹¹ Supporting this view, Carlier observed that the ‘Convention does not suffer from any legal or conceptual weakness’¹¹² per se and can adapt to various circumstances. He believed that the major obstacle to an evolutionary understanding of the Convention is the political reluctance of interpretive agents rather than the refugee definition itself.¹¹³ In line with these views, Durieux noted that the refugee definition has conferred a certain dynamism to the 1951 Convention, which explains the ‘remarkable resilience of a norm that was adopted over 60 years ago’.¹¹⁴ More specifically, Zetter considered that the malleability of the refugee definition has been due, in part, to the element of persecution which proved to be an evolutionary notion.¹¹⁵ This view rejoins the one of Schoenholtz who also pointed out that the refugee definition ‘has proven adaptable to the changing nature of persecution’ nowadays.¹¹⁶ Hathaway finally stated in a more recent paper, that the refugee definition has been ‘wonderfully flexible, identifying new groups of fundamentally disenfranchised persons unable to benefit from human rights protection in their own countries’¹¹⁷. He noted that, amongst other term, the persecution limb was particularly malleable.

¹⁰⁸ Jane McAdam, ‘The Enduring Relevance of the 1951 Refugee Convention’ [2017] 29 *International Journal of Refugee Law* 1.

¹⁰⁹ Jerzy Sztucki, ‘Who is a Refugee?’ The Convention Definition: Universal or Obsolete?’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 55-84, 56.

¹¹⁰ Ibid.

¹¹¹ Ibid 58.

¹¹² Jean-Yves Carlier, ‘The Geneva refugee definition and the ‘theory of the three scales’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 37-54 40.

¹¹³ Carlier ibid 40.

¹¹⁴ Durieux (n 1) 149.

¹¹⁵ Roger Zetter, ‘Labelling Refugees: Forming and Transforming a Bureaucratic Identity’ [1991] 4 *Journal of Refugee Studies* 39, 40: ‘there are severe conceptual difficulties in establishing a normative meaning to a label which is a malleable and dynamic as refugee. It is contingent upon notions of persecution, and sovereignty about which there is little consensus’.

¹¹⁶ Schoenholtz (n 78) 84.

¹¹⁷ James C. Hathaway, ‘A global solution to a global refugee crisis’, *Open Democracy*, 29 February 2016, available at <https://www.opendemocracy.net/openglobalrights/james-c-hathaway/global-solution-to-global-refugee-crisis>.

It is true that, overall, the refugee definition and more particularly the notion of persecution, have proven to be rather open to interpretation. Considering that the plenipotentiaries did not define persecution in the hope that it could be used in a flexible manner, rather than because the meaning of persecution was uncontroversial, seems to be more in line with the Final Act's recommendation that the Convention should be interpreted beyond the confines of its initial limitations. As such, a few decades after the entry into force of the 1967 Protocol, a relatively positive assessment can be made in contrast with the pessimistic views initially expressed by early authors on the biased nature of the refugee definition and the notion of persecution. It appears, indeed, that the 1951 Convention has retained a certain relevance nowadays and that the notion of persecution can be interpreted in an evolutionary manner, adapting itself, to a certain extent, to various circumstances of refugees.

Durieux, however, observed that, in spite of this flexible character, there is still some uncertainty regarding the overall scope of the refugee definition. For him, and as per the words used by Schacknove, it is not 'easy to capture what is "essential and universal about refugeehood"' ¹¹⁸ due to the indeterminacy of its elements. This confusion might indeed raise questions as to the extent to which the refugee definition can adapt to the changing refugee context, and more particularly, how the notion of persecution should be understood in a manner that does not entirely contravene the intention of the drafters of the 1951 Convention. Some concerns can here be highlighted. In particular, Miaini noted that the lack of definition can encourage restrictive applications of the 1951 Convention that are not adequate for the evolving needs of refugees. ¹¹⁹ Interpretive guidance is therefore needed. To this end, it should be noted that some elements of interpretation do already exist. They will be analysed below in order to evaluate to what extent they could be used as relevant frameworks for interpreting the notion of persecution.

¹¹⁸ Shacknove quoted in Durieux (n 1) 149.

¹¹⁹ Francesco Maiani, 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-Sensitivity, and the Quest for a Principled Approach' in Cavaille (eds), *Les Dossiers de Grihl* (Online 2010) available at <https://journals.openedition.org/dossiersgrihl/3896>: 'the open-endedness of the refugee definition on this crucial point makes it vulnerable to restrictive interpretations, or even to manipulation'.

D) Basis of definition

In the absence of a definition of persecution in international refugee law, national courts have at times relied on dictionary definitions. These approaches have generally been rejected for being too diverse depending on the language of the definition.¹²⁰ Guidance might therefore be sought elsewhere. In particular, the non-refoulement principle defined in Article 33 of the 1951 Convention has been advanced as a starting point for defining persecution. Additionally, persecution has been defined in the Rome Statute for the purpose of criminal prosecution. The present section will assess both definition proposals and demonstrate that none of them are adequate to delineate the contours of the notion of persecution in the meaning of the 1951 Convention. Although they provide relevant insights for interpreting certain aspects of persecution, further guidance needs to be found elsewhere.

i- The non-refoulement principle according to Article 33 of the 1951 Convention

Storey noted that some early approaches to interpret the notion of persecution searched for the definition of the notion within the dispositions of the 1951 Convention itself.¹²¹ These ‘hermeneutical’¹²² approaches considered that the meaning of persecution can be revealed by Article 33 of the Convention, which states that ‘no contracting state shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. Seemingly encouraging this view, a number of conclusions of the Executive Committee (Excom) of the UNHCR also assimilate the principle of non-

¹²⁰ Hugo Storey, ‘Persecution: Towards a Working Definition’ in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on Migration and International Law* (Edward Elgar Publishing 2013) 459. Carlier (n 114) 44.

¹²¹ Ibid 464.

¹²² Ibid.

refoulement with the concept of persecution.¹²³ These views, however, raise questions as to the extent of the notion of persecution and whether it should only be interpreted as a threat to life and freedom. The dominant opinion is that the concept of ‘threat to life and freedom’ can be used as a departure point for interpreting persecution, but it would be too restrictive to confine the notion to Article 33. Some authors considered that the provisions of this article constitute ‘core elements’ of persecution,¹²⁴ but suggested that persecution has a broader meaning than this. In the words of Goodwin-Gill, persecution is ultimately a matter of ‘degree and proportion’.¹²⁵ Similarly, Hathaway argued that persecution is premised on the more general notion of ‘serious harm’ and was not meant to be confined to ‘consequences of life or death proportions’.¹²⁶ In light of the above, the provisions of Article 33 might appear too restrictive to confine the notion of persecution to this article.

This approach is in line with the UNHCR Handbook, which stated that a threat to life and freedom on account of a Convention ground is always persecution but that persecution should be more than that. In addition to the principles of Article 33, the UNHCR Handbook goes on to enumerate other forms of restrictions that could warrant refugee status. In a later document, the UNHCR also observed that according to the *travaux préparatoires*, the principle of non-refoulement was meant to be different than the criteria laid down by the refugee definition. According to the Refugee Agency:

‘the words ‘where his life or freedom would be threatened [...] were not intended to lay down a stricter criterion than the words “well-founded fear of” persecution figuring in the definition of the term “refugee” in Article 1 A (2). The different wording was introduced for another reason, namely

¹²³ Excom Conclusion No. 6 (XXVIII) – 1977: ‘The Executive Committee [...] (c) Reaffirms the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees’. Excom Conclusion No. 15 (XXX) – 1979: ‘(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of non-refoulement’.

¹²⁴ McAdam (n 46) 683; Goodwin-Gill and McAdam (n 12) 92.

¹²⁵ Goodwin-Gill and McAdam *ibid* 92.

¹²⁶ Hathaway and Foster (n 39) 183.

to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution'.¹²⁷

It appears indeed that the dispositions of Article 33 concern procedural issues rather than eligibility criteria to refugee status. Whilst, as stated by the UNHCR, these terms can indeed be considered relevant to designate forms of harm that amount to persecution, the notion of persecution ought to be interpreted in a manner that goes beyond Article 33.

ii- Persecution in international criminal law

The notion of persecution has also been widely discussed in the jurisprudence of various international tribunals¹²⁸ in the context of the commission of war crimes. An authoritative definition of persecution was eventually codified in the 1998 Statute of the International Criminal Court.¹²⁹ According to this statute, persecution consists in 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.¹³⁰ However, in this definition, an act of persecution has to be perpetrated in connection with a crime against humanity, which appears to constitute a rather strict approach.¹³¹ Indeed, the definition of persecution in the context of the Rome Statute is meant to apply to the prosecution of individuals responsible of international crimes only. As such, it contrasts with the protection purpose of the 1951 Convention. On this point, Goodwin-Gill noted that the value of this definition is 'necessarily limited by its criminal context'¹³² and therefore, transposing this definition into refugee law might not be adequate. This observation is in line with

¹²⁷ UNHCR, 'Note on Non-Refoulement' (Submitted by the High Commissioner) EC/SCP/2, 23 August 1977, available at: <http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>.

¹²⁸ Inter alia, *Prosecutor v. Timohir Blaskic* Case IT-95-14-A, 29 Jul. 2004, Appeals Chamber, para. 131-5; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case IT-95-14/2-A, 17. Dec 2004, Appeals Chamber paras. 105-9; mentioned in Goodwin-Gill and McAdam (n 12) 85.

¹²⁹ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6 (Rome Statute).

¹³⁰ Article 7 (g) of the Rome Statute.

¹³¹ Goodwin-Gill and McAdam (n 12) 96.

¹³² Ibid 95.

Foster's contention that 'since different aims and policy objectives inform different areas of the law, there is a danger in transplanting approaches developed in an area with one set of objectives into a field that has quite different policy aims'.¹³³ In this sense, Sunga also highlighted the particular tensions between the criminal law and refugee law as he argued that the definitions of persecution in both fields do not 'denote the same meaning'.¹³⁴ However, he did not provide more explanation on this point. To fill this gap, Musalo later pointed to an important particularity of refugee law, namely that the victims should not 'be required to prove their persecutor's intent in order to establish refugee status'.¹³⁵ This element is starkly opposed to the requirement of a criminal intent in international criminal law and, therefore, makes persecution in international refugee law a discrete concept.

Similarly, Turk and Nicholson noted the limitations of the Rome Statute's definition and observed that it would not be appropriate to rely on it for refugee law purposes. They, however, considered that victims of persecution under the Rome Statute could qualify as refugees under the 1951 Convention, in particular in view of the severity of the harm suffered. For them, 'it is possible to deduce from the various crimes contained in the statute the conclusion that their victims are often refugees, which would indicate the breadth of the notion of persecution in the refugee law context'.¹³⁶ In light of the above, it can be concluded that whilst the Rome Statute might provide an indication of what types of harm amount to persecution in the context of the refugee definition, it should not be used to restrict the notion. This view has not been disputed, and, in general, the Rome Statute has not been extensively relied upon in domestic jurisdictions to interpret the notion of persecution for the purpose of examining eligibility to refugee status.

¹³³ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 57.

¹³⁴ Lyal S. Sunga, *The Emerging System of International Criminal Law*, (Kluwer Law International 1997) 149.

¹³⁵ Karen Musalo, 'Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms' [1994] 15 *Michigan Journal of International Law* 1179, 1200.

¹³⁶ UNHCR 'Refugee Protection in International Law' edited by Erika Feller, Volker Türk and Frances Nicholson, 01 January 2003, 38, available at <http://www.unhcr.org/419c73174.html>.

In light of the foregoing, no comprehensive guidance can be found in international law for interpreting the notion of persecution, although some insights can be drawn from Article 33 of the 1951 Convention and Article 7 of the Rome Statute. However, both the literature and the UNHCR tend to converge on this point, by considering that persecution has a wider ambit than the above definitions.

Part 3- Concluding remarks

The present chapter has demonstrated that the notion of persecution emerged in a specific historical and geopolitical context that initially gave a certain political orientation to the notion of persecution. In spite of this political imprint, the absence of a definition has conferred a flexible character to the notion, making the 1951 Convention adaptable to new circumstances of refugees. During the cold war period, the interpretation of persecution raised little concern in domestic jurisdictions but, after the collapse of the Soviet Union and the end of the global polarity between two opposing blocs, the new geopolitical dynamics brought inexorable changes on the international scene. In particular, refugee movements started to diversify. New types of problems, not directly related to political oppression, gradually emerged and constituted new causes of forced displacements.

Given the relatively malleable character of the concept of persecution, evolutionary interpretations of the term are possible but, due to its vagueness, major risks of inconsistency also emerged. Therefore, whilst the meaning of persecution has ‘initially been relinquished to the subsequent interpretation of each state party’, there is now a need for a more principled and less subjective and political application of the notion.¹³⁷ A more coherent approach is indeed needed for two major reasons. First, it is necessary to ensure that the notion of persecution is applied with sufficient flexibility in order to adapt to the changing circumstances of refugees and avoid excessively restrictive understandings of the 1951 Convention. Second, given

¹³⁷ Chetail (n 35) 26.

the major risk of fragmentary jurisprudence that arises from the diversification of asylum claims, some guidance is desirable to ensure the coherence of the international protection system. Asylum applications in Western jurisdictions have surged at the end of the cold war and still continue to regularly increase,¹³⁸ making this necessity more pressing than ever.

This chapter has demonstrated that the 1951 Convention has a protective purpose that has been politically tainted, but that needs to be interpreted in an evolutionary manner. It has also been demonstrated that the notion of persecution has an individualist dimension which requires that refugees should face an individual risk of harm, thus setting incompressible boundaries to the modalities of interpretation. The extent to which the notion of persecution should be evolutionary within these boundaries remains unclear and has been debated amongst scholars. Whilst they have proposed various interpretive frameworks to overcome the above-mentioned hurdles, the dominant framework proposes an approach specifically based on basic human rights. The potentials and limitations of this approach will be evaluated in the following chapter.

¹³⁸ UNHCR, 'Global Trend: Forced Displacement in 2016', available at <http://www.unhcr.org/5943e8a34.pdf>.

Chapter 2: Developing a framework for interpreting the notion of persecution: an assessment of the basic human rights interpretive model

Given the lack of authoritative guidance for interpreting persecution and the risk of inconsistent approaches that ensues, scholars have highlighted the need to develop a principled approach in order to build a more coherent system of international protection. According to the dominant view, the notion of persecution should be interpreted in light of basic human rights. One of the major proponents of the basic human rights approach is James Hathaway¹ who developed his proposal in the LORS. Given that his approach has gained major traction in the literature and the jurisprudence, particular attention will be lent to his work in this chapter. It will be wondered whether Hathaway's narrative is an adequate one, both in terms of legitimacy and utility?

The present chapter will first evaluate the legal justifications for using basic human rights as interpretive benchmarks (Part 1). To this end, reference will be made to authors that either shared or disputed Hathaway's views. Further to this, the modalities of Hathaway's framework will be closely analysed in order to assess its practical scope. These modalities include the quantitative and qualitative aspects of the notion of persecution (Part 2) as well as the role of the surrogacy principle in interpreting the notion (Part 3). It will be argued that a basic human rights framework does not solve the problem of inconsistent approaches and creates the risk of encouraging rather restrictive interpretations of the notion of persecution, depending on the different parameters relied upon by decision makers.

¹ James Hathaway and Michelle Foster, *The Law of Refugee Status*, (2nd edn; CUP 2014). The first edition of the book, drafted by Hathaway himself, dates back to 1991.

Part 1) Legal and theoretical justifications for referring to human rights as interpretive benchmarks

The nature of the 1951 Convention has been debated amongst authors. Hathaway and the proponents of the human rights approach consider that refugee law and international human rights are closely linked and that refugee law should be interpreted in light of human rights. Some have even argued that the 1951 Convention is, in itself, a human rights treaty (A). In contrast with these views, other commentators have contended that refugee law and human rights law are disconnected and that refugee law should be understood as establishing a self-contained regime (B). Finally, others have pointed out that neither perspectives are valid, but that the notion of persecution should nonetheless be interpreted in light of human rights because it simply has become the orthodoxy in refugee law (C). These different positions will be assessed hereunder in order to determine whether human rights should have a role to play in interpreting the Convention and to what extent.

A) Theological approach to refugee law: the 1951 Convention as a human rights instrument?

According to Hathaway, objective principles need to be relied upon in order to interpret the notion of persecution. For him, interpretive guidance should be sought in the rules of treaty interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT).² In particular, he noted that, according to Article 31 of the VCLT, treaties should be interpreted in good faith, taking into account the context, object and purpose of a treaty. To this end, he referred to the Preamble to the 1951 Convention³ and pointed out that the first two paragraphs clearly mention the UN Charter, the Universal Declaration of Human Rights (UDHR), and the concept of ‘fundamental rights and freedoms’.⁴ This led him to conclude that the Preamble grounds

² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS, vol. 1155, p. 331. See also Hathaway (n 1) 5-6. Footnote 23: According to Hathaway, the rules of treaty interpretation set out in the VCLT codify customary law and therefore are applicable to previous treaties.

³ Hathaway and Foster (n 1) 193.

⁴ Ibid 193-194.

the 1951 Convention on a human rights context, making the Convention a tool for human rights protection. As such, he believes that human rights standards should be used as benchmarks for interpreting the notion of persecution.

Hathaway's view that human rights constitute the 'background'⁵ against which persecution should be interpreted is not new. Before him,⁶ some authors had already expressed the idea that international human rights were valuable references for informing the purpose of the 1951 Convention. For instance, in 1953, Vernant highlighted the necessity of interpreting the notion of persecution in the most objective manner possible, through the human rights principles existing at that time in the UDHR. He defined the notion of persecution as 'severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the "Universal Declaration of Human Rights"'.⁷ Although Vernant considered that human rights standards could constitute interpretive benchmarks, he barely gave any doctrinal justification for this and did not further elaborate on the exact role of human rights in informing the meaning of persecution. For him, the UDHR simply constituted 'a code of honor'⁸ that could provide normative guidance. He also considered that there were limitations to this framework because the UDHR standards were drafted in general terms.⁹ Therefore, he contended that more specific principles were needed to guide the interpretation of the notion of persecution but he did not provide more insight as to the nature of such guidance.

In 1983, Goodwin-Gill also proposed to rely on human rights principles in order to interpret the notion of persecution.¹⁰ However, like Vernant, he did not extensively explain the theoretical roots for choosing this mode of interpretation. It was only in 1991 that Hathaway filled this doctrinal

⁵ Ibid 193.

⁶ The first edition of the book *LORS* dated from 1991.

⁷ Jacques Vernant, *The Refugee in the Post-War World* (Yale University Press 1953) 8.

⁸ Ibid.

⁹ Ibid.

¹⁰ Guy S. Goodwin-Gill, *The Refugee in International Law* (OUP 1983), 38–46.

gap when he ‘systematised’¹¹ the existence of an interpretive human rights framework by reference to the rules of treaty interpretations and the major role of the Preamble in setting the object and purpose of the Convention. Similar to his approach, Foster also referred to the VCLT to argue that the interpretation of the refugee definition should be consistent with the object and purpose of the Convention for which guidance is to be found in the Preamble.¹² She added that the Convention was imbued with ‘the developing body of international human rights law’¹³, which reinforced the conclusion that human rights constituted relevant referential standards for interpreting the refugee definition. This view was further shared by Carlier who considered that the refugee definition should be interpreted ‘theologically’¹⁴ in light of the principle that ‘human beings shall enjoy fundamental rights and freedoms without discrimination’¹⁵ as enshrined in the first recital of the Preamble.¹⁶ Parrish also contended that, according to the Preamble, the 1951 Convention was established with ‘primary consideration of the UDHR’. For him, these references were justified by the fact that the UDHR had ‘been almost universally accepted and repeatedly affirmed’ and that ‘no state can legitimately argue that its provisions are not valid as, at the very least, aspirations and ideals for its own citizens’.¹⁷ Similarly, Anker supported the view that refugee law and human rights were closely linked as she noted that ‘refugee law grants protection to a subset of persons who have fled human rights abuses’¹⁸ and it should be therefore interpreted in human rights terms.

¹¹ Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio-Marín (eds), *Human Rights and Immigration*, (OUP 2014) 26.

¹² Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 42.

¹³ Ibid 49.

¹⁴ Jean-Yves Carlier, ‘The Geneva refugee definition and the ‘theory of the three scales’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 38.

¹⁵ Ibid.

¹⁶ Ibid 39.

¹⁷ M. J. Parrish, ‘Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection’ [200] 22 *Cardozo Law Review* 223, 258. At p 259, Parrish even proposed a definition of a refugee based on the UDHR: For him refugees are individuals who have left their country ‘because of persecution or a well-founded fear of persecution on account of a violation of the principles embodied in the Universal Declaration of Human Rights’.

¹⁸ Deborah E. Anker, ‘Refugee Law, Gender, and the Human Rights Paradigm’ [2002] 15 *Harvard Human Rights Journal* 133, 134.

As the human rights framework of interpretation gained more traction among scholars, some authors considered that there were more than mere theological links between refugee and human rights protection. They, in fact, argued that refugee law was a subset of international human rights law. For instance, Clark and Crépeau stated that the 1951 Convention should be considered an ‘early human right treaty’.¹⁹ They further pointed out that the juridical context of the Convention should be understood in an evolutionary manner, taking into account all the subsequent human rights treaties that have been adopted since 1951 to complement the Refugee Convention.²⁰ McAdam adopted similar views as she noted that the Convention constituted ‘part of the corpus of human rights law, both informing and informed by it’.²¹ She considered that the Convention took the UDHR as a departure point to create a specific protection regime for refugees based, in part, on its principles. As such, she stated that the 1951 Convention is in fact a ‘specialist human rights treaty’,²² which acts as a form of ‘*lex specialis*’.²³

Of note, however, is that the above authors referred to different types of human rights standards, thus indicating a lack of consensus on which particular human rights norms form the background of the 1951 Convention. Whilst some scholars simply refer to the UDHR, others talk about ‘fundamental rights and freedoms’ and some others mention human rights, more generally as a concept. To clarify exactly which human rights norms were the most relevant for interpreting the 1951 Convention, different proposals have been made by scholars. Before analysing more thoroughly these views, the position of other authors opposing the primacy of human rights in interpreting the Convention, will be considered below in order to define more precisely the contours of the interpretive debate.

B) International refugee law as a self-contained regime?

¹⁹ Tom Clark and François Crépeau, ‘Mainstreaming Refugees. The 1951 Convention and International Human Rights Law’ [1999] 17 Netherlands Quarterly of Human Rights 389, 391.

²⁰ Clark and Crépeau *ibid* 392.

²¹ Jane McAdam, ‘The Refugee Convention as a rights blue print for persons in need of international protection’ New Issues in Research, Research Paper No. 25, (UNHCR Policy Development and Evaluation Service, July 2006) 4.

²² *Ibid* 209.

²³ Jane McAdam, *Complementary Protection in International Refugee Law* (2nd edn, OUP, 2011) 209.

The view that the 1951 Convention has a human rights background has not been shared by all authors. Some commentators considered that refugee law and human rights law are actually disconnected and that the 1951 Convention has established a self-contained regime. In particular, Tuitt pointed to the ‘refugee law’s reluctance to embrace human rights norms’.²⁴ She did not address the legal grounds for rejecting the human rights narrative but she rather emphasised the practical concerns raised by this narrative to conclude that it did not constitute an adequate mode of interpretation. On a similar note, Steinbock also rejected the human rights interpretive method. He adopted a different angle, as he addressed the legality of this approach by contending that a proper reading of the VCLT yields a different result from what Hathaway argued. To him ‘the objects and purposes [of a treaty] must be grounded in the terms of the treaty itself’.²⁵ He therefore proposed to go back to the plain meaning of the text. For him, the 1951 Convention does not have the same purpose as other human rights treaties because it provides for a limited regime of protection. He pointed out that, according to the refugee definition, only individuals facing persecution for some reasons would be protected, which contrasts to the broader philosophy of human rights. Steinbock considered that interpreting persecution in light of human rights would contravene the meaning of the text and, in particular disregard the limitations established by the five Convention grounds.²⁶ As such, he contended that a more restrictive approach should be applied, and that only a minimal set of rights should be referred to.²⁷ Other authors, such as Haddad, also refused to consider that the Refugee Convention had a human rights character. Haddad contended that human rights simply do not align with the inherent limitations of refugee law whereby sovereign states are able to impose limitations on entry and on the rights afforded to refugees within their territory. As such, Haddad considered that refugee protection is ‘instigated

²⁴ Patricia Tuitt, ‘Human rights and refugees’ [1997] 1 *The International Journal of Human Rights* 66, 69.

²⁵ Daniel J. Steinbock, ‘Interpreting the Refugee Definition’ [1998] 45 *UCLA Law Review* 733, 772.

²⁶ *Ibid* 780.

²⁷ *Ibid* 783.

more by issues of state security than humanitarian concerns'²⁸ and rejected the idea that human rights underpin the 1951 Convention.

More recently, Cantor also argued that human rights law does not constitute an adequate background against which the notion of persecution should be interpreted. He stated that the Preamble to the 1951 Convention 'offers a meagre basis on which to ground a human rights-based interpretation of Article 1A(2)'.²⁹ He noted that, apart from the first two paragraphs, the Preamble does not adopt a strong human rights narrative.³⁰ Therefore, he questioned the weight that has been given to the first two paragraphs while the rest of the Preamble seems to have been disregarded. For him, the first two paragraphs have in fact a 'backward-looking' orientation, 'speaking to the past concerns of the UN'.³¹ In contrast, the three remaining paragraphs are forward-looking, and, as such, Cantor contended that they carry more normative weight. According to him, they present the refugee problem as a 'social and humanitarian problem'³² instead of a human rights problem. He concluded that the plenipotentiaries, in fact, aimed at creating a regime 'afresh on its own intrinsic terms rather than via [at the time] novel UN human rights concepts'.³³ He did not dispute the relevance of human rights standards in informing the meaning of the notion of persecution but he considered that they should be used as 'illustrative rather than determinative of the concept of persecution'.³⁴ For the above authors, the 1951 Convention established an independent legal regime, distinct from human rights law. Some of them, however, considered that human rights standards are not entirely irrelevant in interpreting the Convention but they pointed out that they should have a minimal role in providing interpretive guidance.³⁵

²⁸ Emma Haddad, 'Refugee protection: a clash of values' [2003] 1 *The International Journal of Human Rights* 1, 14.

²⁹ James Cantor, 'Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm' in *Human Rights and the Refugee Definition Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 349-395, 374.

³⁰ *Ibid.*

³¹ *Ibid.* 374.

³² *Ibid.* 375.

³³ *Ibid.* 375.

³⁴ *Ibid.* 393.

³⁵ In Steinbock (n 25 783, the author noted that human rights rules of customary law could be relevant interpretive benchmarks. In Cantor (n 29) 395, did not reject entirely the relationship between human rights and refugee law but he considered that the role that human rights should play in interpreting refugee law notions should be more 'modest'.

In line with these views, it is true that the historical background to the 1951 Convention gave little consideration to human rights principles. In particular, no human rights standards were mentioned in the pre-war instruments for refugee protection³⁶ as these instruments pre-dated the emergence of a human rights movement on the international scene. The *travaux préparatoires* also barely refer to human rights. As such, it appears that the elaboration of the 1951 Convention is anchored to a legal movement different from the development of international human rights law. This has been demonstrated by early authors³⁷ who have highlighted that the 1951 Convention was drafted as a compromise between the interests of states and the humanitarian needs of individuals, and that it was imbued with a particular political orientation as noted in chapter 1. This theoretical and political background, therefore, departs from the human rights purpose strongly advocated by recent scholars.

C) The compromise: human rights as the orthodoxy?

Some commentators eventually reconciled the divergent views on the nature of the 1951 Convention by considering that its initial purpose does not have a major bearing on the way it should be interpreted. They departed from a theological approach to emphasise the importance of the interpretive practice embedded in the evolving legal context of the Convention. For instance, Gowland-Debbas stated that, at the beginning, ‘refugee law was segregated from the development of international human rights law’,³⁸ but human rights law progressively gained influence on the way refugee law was applied. For her, only ‘legal purists’³⁹ would reject the importance of human rights in informing the meaning of the Convention. Generally, she believed that ‘bringing refugee law out of the narrow confines in which it has been isolated [...] has a number of advantages’⁴⁰ in terms of widening refugee

³⁶ See chapter 1- Part 1.

³⁷ Ibid.

³⁸ Gowland-Debbas, *The Problem of Refugees in The Light of Contemporary International Law Issues*, (Series of Papers, Gowland-Debbas eds, Martinus Nijhoff Publishers, 1994) 3.

³⁹ Ibid 4.

⁴⁰ Ibid.

protection. Although establishing juridical links between both fields is not easy, she noted that conflating human rights law and refugee law has become ‘contemporary practice’⁴¹ and has been widely endorsed in the jurisprudence.⁴² Gowland-Debas, therefore, introduced the idea that the evolutionary state practice should have a major influence on the way the 1951 Convention was applied, thus closely linking the interpretation of the refugee definition with the evolution of its legal context.

Similarly, Chetail argued that, although the 1951 Convention was supposed to create an independent system of protection, disconnected from human rights law, this regime has been widely interpreted in light of human rights law in the past decades, which has eventually blurred the distinction between human rights and refugee protection⁴³. He stated that ‘in a normative environment largely dominated by human rights, all observers are now convinced of the human rights nature of the Geneva Convention’.⁴⁴ According to him, ‘human rights law has thus become the new orthodoxy of refugee law’⁴⁵ even though this was arguably not the intent of the drafters. On a similar note, Ghraíne observed that there is some uncertainty as to the relationship between human rights law and refugee law and whether both should be conflated. She recalled that there is no clear position in the scholarship on whether human rights should only influence the interpretation of the Convention or whether they should entirely define its parameters. In spite of these uncertainties, she noted that given the current legal context of the Convention, human rights should ‘at the very least’⁴⁶ inform the meaning of the refugee definition. According to her, ‘the fact that an overwhelming majority of the Refugee Convention’s states parties are parties to at least one, if not many, human rights-based treaties, is relevant in the interpretation of the Refugee Convention’s terms’.⁴⁷ As such, she also highlighted the importance of the developing interpretive context to conclude that human

⁴¹ Ibid.

⁴² Ibid.

⁴³ Chetail (n 11).

⁴⁴ Ibid 70.

⁴⁵ Ibid 71.

⁴⁶ Brid Ni Ghraíne, ‘The Internal Protection Alternative Inquiry and Human Rights Considerations - Irrelevant or Indispensable’ [2015] 27 International Journal of Refugee Law 29, 34.

⁴⁷ Ibid 34.

rights principles need to be taken into consideration to interpret the Convention. The above arguments also support the contention made by Foster that, in addition to the human rights standards enshrined in the Preamble, other human rights treaties should be referred to in order to interpret the Convention as they constitute ‘relevant rules of international law’ mentioned in Article 31(3)(c) of the VCLT.⁴⁸ In the opinion of Cantor, this disposition remains, however, ambiguous. For him, Article 31(3)(b), which points to the importance of the ‘subsequent practice in the application of the treaty’,⁴⁹ constitutes a more adequate legal basis for interpreting the Convention. He nonetheless agreed with all the previous authors that the changing legal context in which the refugee definition is applied, should be taken into consideration in order to interpret its terms and further pointed out that human rights should not be ignored in this exercise.

D) Concluding remarks

In light of the above, various positions regarding the relationship between international refugee law and international human rights law have been expressed. Some commentators argued that, given, the close theological links between human rights law and refugee law, human rights should closely influence the interpretation of the refugee definition. Others go as far as to affirm that the Convention is, in itself, a human rights treaty, thus implying that human rights have a pivotal importance in informing the application of the Convention. Different authors warned that caution should be exerted when using human rights standards as interpretive benchmarks because this could contravene the initial intent of the plenipotentiaries. Some of these authors however did not entirely reject the fact that human rights can have a certain influence in interpreting the refugee definition. For others, the initial purpose of the Convention matters less than the contextual understanding of its evolution and stated a human rights interpretation of the notion of persecution had become the new orthodoxy.

⁴⁸ Foster (n 12) 51-70.

⁴⁹ Cantor (n 29) 377.

These divergent views show that the intent of the plenipotentiaries as to the role of human rights standards, remains unclear. However, human rights law and international refugee law should not be entirely disconnected, as pointed out in the literature. Whilst the initial intent of the drafters should not be disregarded, it appears clear that the evolution of the legal practice can have an influence on the way the 1951 Convention should be interpreted in order to make it relevant to the evolving needs of refugees in line with Articles 31(3)(b) and (c) of the VCLT. As already noted above, questions then emerged such as, which human rights ought to be relied upon for determining what forms of harm constitute persecution, and to what extent should this be the case? How should human rights inform the meaning of the notion of persecution? The interpretive exercise has to respect at least the protective purpose of the refugee definition, and has to be sufficiently adaptable to the evolving circumstances of refugees, keeping in mind that the notion of persecution confers an individual dimension to the harm feared.⁵⁰

In order to answer these questions, different views have been advanced on the modalities of a human rights narrative for interpreting persecution. Hathaway has proposed the most detailed study on this element and developed an interpretive framework that relies on basic human rights as relevant benchmarks. According to him, persecution should be understood as the ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection’.⁵¹ Through this formulation, Hathaway considered that persecution is composed of serious harm and failure of state protection. His framework will be assessed below and evaluated against the proposals of other authors to determine whether it encourages consistency in national jurisdictions and whether it is sufficiently adapted to the modern circumstances of refugees.

Part 2) The quantitative and qualitative aspects of persecution

⁵⁰ As demonstrated in Chapter 1.

⁵¹ Hathaway and Foster (n 1) 183.

Some authors have highlighted the bi-faceted nature of persecution, demonstrating that it has both a quantitative and a qualitative aspect.⁵² Hathaway has subsumed these two elements into a sub-test of ‘serious harm’ to which he added an extra requirement of lack of state protection to evaluate persecution. As such, he provided a rather complex formulation to define the notion.

This section will analyse both the quantitative and qualitative aspects of ‘serious harm’ as defined by Hathaway, but, a greater focus will be put on the qualitative aspect of persecution (A), because it is the part that has been the most widely debated within the literature and the jurisprudence. In contrast, the quantitative test proposed by Hathaway has been more consensually rejected (B).

A) Qualitative aspect of persecution: basic human rights used as interpretive benchmarks

In order to assess what amounts to persecution, Hathaway argued that the nature of the harm needs to be evaluated in light of specific human rights norms, namely ‘basic’ human rights. The meaning of basic human rights requires further analysis.

i- Serious harm: which human rights should be used as benchmarks?

In the first edition of his book in 1991, Hathaway stated that basic human rights are the norms set out in the International Bill of Rights, namely the UDHR, and the two international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵³ He believed that these instruments are legitimate references because they have been widely ratified and accepted as authoritative standards on the international scene. Hathaway also demonstrated that a certain hierarchy of rights existed, that could guide

⁵² Carlier (n 14) 45; Hathaway and Foster (n 1).

⁵³ Hathaway and Foster (n 1) 193.

the interpretation of the notion of persecution. However, in light of major criticisms highlighting the rigidity and inadequacy of this approach, he abandoned this narrative in 2014. In the last edition of the LORS, he expanded the array of human rights standards that he believed should be considered ‘basic human rights’ as he added that reference should also be made to certain specialised treaties.⁵⁴ He did not consider that all specialised treaties entail basic human rights as he stated that only the ones that have been widely endorsed by states enjoy ‘normative legitimacy’.⁵⁵ According to him, if the interest at stake is not:

‘within the ambit of a human rights norm as defined by a widely ratified international human rights treaty [...] it is unlikely to constitute serious harm in refugee law, since for the human rights fairly to be considered a generally agreed interpretive benchmark for the “being persecuted” inquiry, one should expect to see the norm having been ratified by a supermajority of states across a politically and geographically diverse range of states’.⁵⁶

For Hathaway, basic human rights standards are, therefore, only to be found in treaties that have reached some form of consensus on the international scene.

Foster also provided extensive argument in *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* to support the argument that basic human rights enshrined in widely endorsed treaties can constitute relevant standards of interpretation.⁵⁷ She further added that reference could also be made to customary law, as well as the work of treaty bodies.⁵⁸ In addition to this, she mentioned new sources of basic human rights, namely normative standards developed in soft law instruments.⁵⁹

⁵⁴ Ibid 200-201.

⁵⁵ Ibid 194.

⁵⁶ Ibid 205.

⁵⁷ Foster (n 12) 59.

⁵⁸ Ibid.

⁵⁹ Ibid 70.

According to her, soft law norms should also be referred to for interpreting the notion of persecution because they ‘explicate or amplify existing obligations’.⁶⁰ Whilst her view on the value of customary law and the normative production of treaty bodies was endorsed in the 2014 edition of the LORS – which she co-edited – her position on the value of soft law sources has not been retained. Indeed, to define basic human rights, Hathaway only referred to treaties but remained silent on the role of soft law instruments. In fact, in a different piece of writing, he had specifically rejected the argument that soft law instruments could constitute appropriate references for assessing the notion of persecution because, for him, soft law ‘does not bespeak a sufficient normative consensus’.⁶¹ In his view, these standards ‘should not [...] be treated as authoritative in and of themselves’.⁶² This position contrasted to the one of Foster and, as such, it leaves some uncertainty as to which standards ought to be referred to for interpreting persecution in light of basic human rights.

In spite of the above, the human rights framework proposed by Hathaway has been accepted by many commentators as adequate guidance for interpretation.⁶³ For instance, similarly to Hathaway, Haines enumerated a series of widely endorsed international treaties to define ‘core’ human rights relevant, according to him, for interpreting persecution.⁶⁴ This view has been also shared by Goodwin-Gill who proposed to develop an interpretive narrative that relies on basic human rights⁶⁵ ‘embodied in international

⁶⁰ Ibid 72. She, however, noted that ‘basic human rights’ enshrined in international treaty norms should prevail (79).

⁶¹ James C. Hathaway, ‘The Relationship between Human Rights and Refugee Law: What Refugee Judges Can Contribute’ in International Association of Refugee Law Judges, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Haarlem, The Netherlands: international Association of Refugee Law Judges, 1999) 86.

⁶² Hathaway *ibid*.

⁶³ See UNHCR, ‘Division of International Protection, ‘Gender-Related Persecution: An Analysis of Recent Trend’ (1997) 9 *International Journal of Refugee Law* 79 at 82. Also, Mark Symes, ‘Caselaw on the Refugee Convention: The United Kingdom’s Interpretation in the Light of the International Authorities’ (London: Refugee Legal Centre 2000) 70. Cited in Foster (n 12) 31.

⁶⁴ Rodger Haines, *Gender-Related Persecution in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Erika Feller, Volker Turk and Frances Nicholson eds, CUP 2003) 327-328.

⁶⁵ Guy S. Goodwin-Gill and Jane McAdams, *The Refugee in International Law*, (Oxford University Press 2011) 91.

Conventions'.⁶⁶ He provided a list of rights that he believes should be used as benchmarks, namely the:

‘right to life, the right to be protected against torture, or cruel or inhuman treatment or punishment, the right not to be subjected to slavery or servitude, the right not to be subjected to retroactive criminal penalties, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion’.⁶⁷

In his view, other rights that belong to a different ‘fundamental class’ and that are attached to personal freedom should also serve as references for interpreting persecution.⁶⁸ To summarise his position, he argued that persecution:

‘comprehends measures [...] which threaten deprivation of life or liberty; torture or cruel, in human, or degrading treatment; subjection to slavery or servitude; non-recognition as a person [...]; and oppression, discrimination, or harassment of a person in his or her private home or family life’.⁶⁹

Overall, Goodwin-Gill established a long list of human rights standards that he believes should be referred to for interpreting persecution and generally considered that those rights should be found in widely endorsed human rights treaties like Hathaway (and to a certain extent like Foster). Similarly to the above authors, Carlier proposed to rely on ‘basic human rights’, that he believes are the rights formulated in treaties, to assess the qualitative aspect of persecution.⁷⁰

⁶⁶ Ibid 93.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Jean-Yves Carlier, ‘The Geneva refugee definition and the “theory of the three scales”’ in Frances Nicholson and Patrick Twomey (eds.) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 37, 45-46.

The 'basic human rights' narrative has the advantage of providing conceptual clarity by referring to codified norms through a positivist understanding of the rules of treaty interpretation. However, some commentators criticised this view as they considered that it is either too broad or too restrictive. The interpretive challenges posed by this approach will be assessed below.

ii- Basic human rights approach: a framework that is too broad?

According to Steinbock, relying on 'basic' human rights enshrined in treaties does not constitute an adequate framework. He noted that the formulation developed by Hathaway separated the notion of persecution from the Convention grounds and gave them an autonomous meaning which, he believed, is simply too large.⁷¹ He also considered that this human rights approach poses difficulties, because the catalogue of rights proposed by Hathaway, not only is ambiguous,⁷² but is unduly broad and not in line with the initial intent of the plenipotentiaries.⁷³ According to him, Hathaway's framework 'would make millions of people potential refugees in today's world'⁷⁴ which, he considered, is not appropriate because the scope of refugee law should be narrower than the scope of human rights law. He also noted that there is not any clear reference to the UDHR in the refugee definition. According to him, if the refugee definition was meant to be interpreted in light of the principles enshrined in human rights instruments such as the UDHR, this would have been, simply, mentioned in the definition. Thinking otherwise would amount to considering that the 'wording of the refugee definition was [...] illustrative'⁷⁵ which does not seem to be a reasonable approach. He, however, acknowledged that human rights law and refugee law overlap in the sense that refugee law protects only violations of certain subsets of human rights but, overall, human rights law and refugee law have different purposes and, therefore, refugee law should be more narrowly

⁷¹ Steinbock (n 25) 780.

⁷² Ibid 782.

⁷³ Ibid 738.

⁷⁴ Ibid 782.

⁷⁵ Ibid 785.

understood than human rights law. For him, certain human rights remain relevant for interpreting the notion of persecution but he proposed to narrow down the scope of the framework and to refer only to the ‘most basic human rights involving the most serious harms, such as those recognized as customary international law’.⁷⁶

Steinbock justly pointed to a major deficiency of Hathaway’s approach, namely that it refers to international norms that are quite ambiguous and constitute a rather undefined catalogue of norms. The rest of his proposal, however, seems quite severe as it would confine refugee law to the most egregious forms of hardship as defined by customary law. This point is rather contentious since customary law allows for little flexibility in the interpretation of legal norms. It fixes an existing practice, which takes time to define, and as such, Steinbock’s view does not easily align with an evolutionary approach of the 1951 Convention. This also does not appear to be consistent with the possible intention of plenipotentiaries who had left the definition of persecution open, probably with the objective of allowing for adaptive interpretations of the Convention.⁷⁷ Generally, Steinbock’s proposal that only customary law norms should be used as benchmarks has not been widely adopted in the jurisprudence. His opinion that the refugee definition was meant to have a more restrictive scope was shared by authors such as Haddad⁷⁸ but the dominant view in the literature has generally considered that persecution should have a more flexible meaning. At the opposite end of the spectrum, authors have demonstrated that relying on basic human rights to interpret persecution, could in fact be too limited.

iii- Basic human rights approach: a restrictive framework?

Hathaway’s positivist approach could be more relevantly questioned in light of the developments of new normative sources. Some authors argued that the different protection needs of individuals might not have been covered

⁷⁶ Ibid 787.

⁷⁷ On the intention of the plenipotentiaries see A.Grah-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), 193.

⁷⁸ Haddad (n 28).

by all the rights codified in international treaties⁷⁹ and, therefore, highlighted the limitations that an approach based on treaty norms can have on interpreting the notion of persecution.

In particular, Edwards pointed to the narrow scope of basic human rights as she observed that they do not reflect the complexity of refugees' experiences. For her, 'it is possible that all forms of persecution have not yet been identified or codified in international human rights law'.⁸⁰ Even though new human rights standards have been developed in treaties in the past decades, there is indeed no guarantee that these standards will be sufficient to respond to the rapidly evolving circumstances of refugees. In light of this situation, Edwards argued that 'it would be unwise to limit [the] application [of persecution] to serious human rights abuses'.⁸¹ To illustrate her statements, she mentioned examples of gender-based violence. She explained that before women's rights were codified in international treaties, gender-based violence was, nonetheless, an existing form of persecution. She also mentioned that the principle of the best interest of the child, as derived from the recognition of specific children's rights in international instruments, was an existing principle before the adoption of the Convention on the Rights of the Child (CRC).⁸² According to her, this does not mean that human rights should be ignored. In fact, she considered that human rights law has a role to play in elucidating the meaning of certain forms of persecution, but she stated that the interpretation of persecution should not be restricted to a rigid human rights framework and should take into account broader circumstances of refugees.⁸³

⁷⁹ Alice Edwards, 'Age and gender dimensions in international refugee law' in Erika Feller, Volker Turk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 50.

⁸⁰ Edwards, *ibid.* See also Kate Jastram 'Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution' 143-173 in James C. Simeon (eds) *Critical Issues in International Refugee Law: Strategies Towards Interpretative Harmony* (CUP 2010) 143-173. Jastram stated that 'human rights law can also be under-inclusive. If a judge cannot locate specific textual support in human rights law relevant to his or her understanding of the harm at issue, the persecution analysis may be cut short', p 165.

⁸¹ *Ibid.*

⁸² *Ibid.* 51.

⁸³ See for instance, *Matter of Pierre*, 15 I&N 2433 (Board of Immigration Appeals 1975). at [4610]. This case was adjudicated before the adoption of the CEDAW. The Board concluded that the domestic violence faced by the Applicant was a private issue and therefore, fell outside the ambit of the refugee definition.

Following the observation that not all forms of persecution have been codified in formal treaties, other authors have pointed to the development of soft law sources and transnational approaches to refugee law, thus further reinforcing Edwards's position. For instance, Lewis noted that due to the continuing refugee crisis, new protection needs of refugees have emerged but such needs have not been covered by the existing instruments. She believed that there is an 'ongoing need to further elaborate new standards and to develop international refugee law even if these new standards are not codified in international treaties'.⁸⁴ Similarly, Betts explained how soft law instruments can constitute relevant normative sources, outside the gamut of treaties. He noted, for instance, that the protection of Internally Displaced Persons (IDPs) has been ensured through the development of soft law instruments rather than through codified human rights.⁸⁵ Whilst he did not directly mention the situation of refugees, Betts made a general analysis of human rights law and soft law instruments, demonstrating the normative scope of soft law, which he considered can fill the normative gap in human rights law.

This position is shared by Juss who observed that nowadays, legal norms are developing from 'all sorts of sources' and that 'a new generation of international lawyers is now beginning to argue that one must abandon formal mechanisms to determine the pedigree of rules'.⁸⁶ Indeed, he considered that the 'majority of international normative activity takes place outside the ambit of traditional international law'.⁸⁷ In line with the above views, Lambert noted that with the disaggregation of state power,⁸⁸ transnational actors and networks have contributed to the 'international

⁸⁴ Corinne Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution' [2005] 17 *International Journal of Refugee Law* 67, 78.

⁸⁵ Alexander Betts, 'Towards a "Soft Law" Framework for the Protection of Vulnerable Irregular Migrants' [2010] 22 *International Journal of Refugee Law* 209.

⁸⁶ Satvinder Juss, 'The UNHCR Handbook and the Interface Between "Soft Law" and "Hard Law" in International Refugee Law' in Satvinder Juss & Colin Harvey (edn), *Contemporary Issues In Refugee Law* (Edward Elgar, Cheltenham 2013) 31-67, 39.

⁸⁷ Juss *ibid* 39.

⁸⁸ Helene Lambert, 'International refugee law: dominant and emerging approaches', in *Routledge Handbook of International Law* (2009 Routledge, London) 344-354, 349. Lambert also makes reference to Slaughter who argued that in an age of global governance, states are disaggregating and new types of actors progressively emerge.

normative activity and to a changing conception of the world less dominated by a vertical notion of international law and domestic law'.⁸⁹ Lambert considered that, in this context, the human rights approach to refugee law focuses more on the content of the rules but is less 'useful in capturing the complexities of the process of law formation and law developments'.⁹⁰

The above views are in contrast to Hathaway's approach that proposes to confine his interpretive framework to basic human rights enshrined in widely accepted treaties only. Indeed, the aforementioned authors convincingly highlighted the fact that the catalogue of treaty-codified human rights norms appears quite restricted nowadays as the needs and priorities of refugees are changing rapidly, which is in stark contrast to the limited normative ambit of traditional treaties on the international scene. As such, the 'basic human rights approach' might not adequately reflect the most recent evolutions of refugee situations. The promise that it could constitute an evolutionary approach to the notion of persecution is therefore questionable.

iv- Basic human rights: vague notions?

*iv-(a) Shifting the interpretive exercise to an equally vague 'discursive terrain'?*⁹¹

In addition to the above, it could be argued that relying on basic human rights will not adequately solve the problem of inconsistent interpretations of the refugee definition and the notion of persecution as contended by Hathaway. The imprecise character of basic human rights might in fact lead to more fragmentary applications of the refugee definition in state parties, which could in turn undermine the overall coherence of the protection regime of the 1951 Convention. In this view, commentators have pointed to the vague and general character of codified human rights and demonstrated that they can be applied in very different ways.

⁸⁹ Lambert *ibid* 345.

⁹⁰ Lambert *ibid* 353.

⁹¹ Cantor (n 29) 386.

Vernant, who was one of the first scholars to propose that the notion of persecution should be interpreted in light of human rights standards, also warned against the difficulties that could arise from this interpretive approach as he stated that human rights codified in the UDHR were ‘couched in very general terms’.⁹² He specifically highlighted concerns with regards to certain rights, which he believed could pose serious challenges of interpretation such as the ‘right to work, to free choice of employment, to just and favourable conditions of work’.⁹³ He concluded that ‘some lack of precision is [...] inevitable’⁹⁴ when using a human rights approach for interpreting persecution. According to him, reference to external standards enshrined in the international legal order was, however, necessary to guide the interpretation of the notion of persecution but he considered that the norms of the UDHR were not sufficient to constitute a proper analytical framework. As such, Vernant seemed to hope for the development of more precise human rights notions that would complement the abstract concepts of the UDHR. In line with his wishes, international human rights treaties developed at a rapid pace in the second half of the 20th century but in spite of this multiplication of new norms, authors have continued to argue that human rights codified in all sorts of treaties remain general and still raise interpretive challenges.

For instance, Tobin recently demonstrated that human rights are imprecise in nature which often results in inconsistent interpretations. For him, ‘human rights are invariably vague and ambiguous’⁹⁵, and as such, he stated that interpreting these standards constitutes ‘a dilemma’.⁹⁶ He observed that there is a ‘vast range of potential meanings’⁹⁷ for every human right, and general rules of treaty interpretation are of minimal help to elucidate what the meaning of a right is. He stated that this difficulty is even more acute in the case of economic, social and cultural rights because these rights are particularly ambiguous. To illustrate his statements, he mentioned the

⁹² Vernant (n 7) 15, 8.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ John Tobin, ‘Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation’ [2010] 23 Harvard Law Journal 1, 1.

⁹⁶ Ibid.

⁹⁷ Ibid 4.

example of the right to health which is, according to him, a ‘nebulous right’.⁹⁸ Through his observations, he eventually concluded that human rights can be interpreted in very divergent manners, depending on the interpretive agent. In line with his view, Price also stated that human rights are not ‘self-defining’⁹⁹ and raise serious concerns of interpretation.¹⁰⁰ For him, human rights provide a poor interpretive framework and are so general that they do not help to determine whether some specific laws (he provided the example of Islamic dress) are persecutory in nature.¹⁰¹ Similarly, Cantor contended that the language of human rights treaties is particularly unclear and, therefore, it causes conceptual difficulties when it is transposed into refugee law. According to him, relying on a human rights approach for interpreting the notion of persecution, does not provide useful guidance because it simply shifts ‘the interpretative exercise from the terms of the Refugee Convention to a new discursive terrain’.¹⁰² He mentioned the example of the prohibition of ‘torture or inhuman and degrading treatment’ which is as equally vague a concept as the concept of persecution. Therefore, according to Cantor, saying that ‘torture’ amounts to persecution does not provide meaningful interpretive guidance. Cantor generally highlighted the fact that human rights do not constitute specific and determinative benchmarks for eliciting the meaning of the notion of persecution and that the vague character of human rights standards enshrined in widely accepted treaties could lead to more confusion as to what amounts to persecution.

In line with the above views, human rights scholars have also demonstrated that international human rights law constitutes a limited normative field. For instance, Ignatieff and Donnelly consider that human rights simply provide for a minimal set of standards. Although they did not specifically refer to refugee law in their work, they provided valuable insight

⁹⁸ Tobin *ibid.* Tobin makes reference to the work of Jennifer Prah Ruger, ‘Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements’ [2006] 18 *Yale Journal of Law and the Humanities* 273, 273.

⁹⁹ Matthew Price, *Rethinking Asylum: History, Purpose, and Limits* (CUP 2009) 117.

¹⁰⁰ *Ibid* 122: ‘Human rights themselves are not self-defining but require interpretation in light of underlying principles; and human rights often conflict, requiring a decision-maker to rely on a theory that explains why some rights should be prioritized over others’.

¹⁰¹ *Ibid.*

¹⁰² Cantor (n 29) 386.

into the nature of international human rights law that could be useful for assessing the potential and limitations of a basic human rights framework for interpreting persecution. For instance, Ignatieff deemed international human rights a ‘thin theory’¹⁰³ because, according to him, human rights values are applicable in any culture and traditions due to their minimal aspect. He stated that the role of human rights ‘is not in defining the content of culture but in trying to enfranchise all agents so that they can freely shape that content’.¹⁰⁴ As such, he highlighted the fact that human rights do not ‘prescribe the ‘positive’ range of good lives that human beings can lead’¹⁰⁵ and do not constitute a comprehensive answer to all the complex needs of individuals. On a similar note, Donnelly considered that human rights are broad concepts¹⁰⁶ that can be relativised depending on the way they are interpreted or implemented. According to him, human rights ‘permit a wide range of particular practices’.¹⁰⁷ In their respective analyses, Ignatieff and Donnelly pointed to the general character of basic human rights and demonstrated that human rights norms can be variably interpreted depending on the context in which they are applied. These observations, however, contrast with the initial contention of Hathaway that human rights constitute an objective basis for interpreting the 1951 Convention in a consistent manner.

In line with the above views, it can be assumed that, in order to reach a common understanding amongst a large panel of different actors, states formulated human rights in international treaties in quite general terms. The impreciseness of those rights can not only lead to different outcomes but can also encourage narrow interpretations of the notion of persecution. In light of the foregoing, it can be considered that indexing an interpretive approach exclusively on basic human rights codified in international treaties raises the risk of constructing a vague framework that can foster inconsistent

¹⁰³ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Gutman eds. Princeton University Press 2001) 56.

¹⁰⁴ Ibid 73.

¹⁰⁵ Ibid 73.

¹⁰⁶ Jack Donnelly, ‘The Relative Universality of Human Rights’ [2007] 29 *Human Rights Quarterly* 281, 299.

¹⁰⁷ Ibid 300.

applications of the 1951 Convention, depending on the understanding that interpretive agents have on the right in question.

iv-(b) - Human rights jurisprudence: a solution to provide precise interpretive guidance?

Hathaway and Foster have provided some answers to the above concerns. When difficulties of interpretation arise, notably due to the unclear meaning of a right, Hathaway and Foster suggested relying on the work of treaty bodies¹⁰⁸ in order to clarify the content of human rights. Indeed, treaty bodies have been established to monitor the application of their treaty of reference and to provide authoritative interpretation of certain human rights provisions, which can help to overcome their abstract nature.¹⁰⁹ Whether a human rights framework of interpretation should extensively rely on the work of treaty bodies as argued by Hathaway and Foster is, however, questionable as this could raise additional difficulties. Indeed, the jurisprudence of treaty bodies has been criticised for being inadequate, and at times, controversial as it will be demonstrated below.

In particular, Edwards has pointed to many concerns surrounding the work of treaty bodies. Firstly, she observed that women are underrepresented in the decision-making process, thus raising issues as to the equal representation of their interests when human rights are interpreted.¹¹⁰ She provided an example of such gender bias as she stated that domestic violence is rarely qualified as torture by treaty bodies.¹¹¹ This is particularly concerning given that in the past decades, an increasing number of women refugees have lodged asylum claims based on gender related forms of violence.¹¹²

In addition, Edwards demonstrated that the work of treaty bodies does

¹⁰⁸ Hathaway (n 1) 195.

¹⁰⁹ On this, see Nadia Bernaz, 'Continuing evolution of the United Nations treaty bodies system', *Routledge Handbook of International Law* edited by Scott Shiran and Sir Nigel Rodley, (Routledge Handbook 2013) 707.

¹¹⁰ Alice Edwards, *Violence against Women under International Human Rights Law* (OUP 2010) 124.

¹¹¹ Ibid 129.

¹¹² On this see chapter 1, Part 2.

not necessarily solve the problem of indeterminacy of human rights standards. For instance, in the case of individual communications, she argued that the legal process is generally consensual and, therefore, can ‘lead to compromise to the lowest common denominator’.¹¹³ Further to this, she observed that treaty bodies often follow an unclear methodology of interpretation, which regularly results in inadequate decisions. According to her, many General Comments simply remain broad ‘statements as to the meaning of particular terms of rights without explaining fully the background to, or reasons for, such an interpretation’.¹¹⁴ Finally, Edwards also observed that ‘deciding the subject matter for a General Comment is largely ad hoc and is not based on any long-term strategy’.¹¹⁵ In this sense, she highlighted the fact that the overall jurisprudence of treaty bodies lacks a coherent vision. The lack of an overall principled approach has also been pointed out by Mechlem, who noted that committee members of treaty bodies often made ‘contradictory remarks’,¹¹⁶ thus undermining the coherence of the system. Similarly, Komanovics pointed to the inconsistent interpretations of the treaty bodies on certain human rights terms.¹¹⁷ More specifically, Goodwin-Gill demonstrated that the decision of treaty bodies, and in particular of the Human Rights Committee (HRC) can be ambiguous and mislead the interpretation of the terms of the 1951 Convention¹¹⁸ as was the case in claims relating to conscientious objection to military service.

Additionally, another problem with the activity of treaty bodies is that

¹¹³ In, Edwards (n 110) 123. the author however acknowledged the increase of dissenting opinions in the past years.

¹¹⁴ Ibid 116. Similar remarks are noted by Mechlem. He also noted that they follow a precise methodology as they often neglect the rules of treaty interpretation. See Kerstin Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’ [2009] 42 Vanderbilt Journal of Transnational Law 905, 908.

¹¹⁵ Edwards (n 110) 116.

¹¹⁶ Mechlem (n 114) 908.

¹¹⁷ Adrienne Komanovics, ‘Strengthening the Human Rights Treaty Bodies: A Modest but Important Step Forward’ [2014] 29 Pecs Journal of International and European Law 7, 13.

¹¹⁸ Goodwin-Gill more specifically pointed to the ambiguous nature of the work of the HRC. He analysed the decisions of the HRC in the context of claims arising out of objections to compulsory military service and criticised the controversial decisions of the HRC majority in these cases. In particular, he regretted the overreliance of the UNHCR on the HRC’s position in the guidelines on international protection on asylum claims related to military service, and warned that extra diligence should be exercised when referring to the work of treaty bodies. Goodwin-Gill demonstrated here that the decision of the majority of the HRC can be at times controversial and simplistic. See Guy S. Goodwin-Gill, ‘The Dynamic of International Refugee Law’ [2013] 25 International Journal of Refugee Law 651, 657-661.

it seems to foster the emergence of some discrete rights that are only entailed in widely accepted human rights instruments. For instance, the HRC has developed the meaning and scope of only certain civil and political rights based on the normative standards of the ICCPR, such as the right to conscientious objection¹¹⁹ or Lesbian Gay Bisexual Transsexual Intersex (LGBTI) rights.¹²⁰ The same reasoning is applicable to any treaty body that only interprets the rights of their treaty of reference. As a result, human rights jurisprudence has left untouched numerous other forms of harm such as collective rights of societies, as for example the right to development, that have not been set out in any treaty but nonetheless reflect contemporary concerns of individuals.

In light of the foregoing, it can be argued that there are inherent deficiencies in the work of treaty bodies. This view can be opposed to Hathaway and Foster who extensively relied on international human rights jurisprudence, in particular the jurisprudence of the HCR, to demonstrate that basic human rights should constitute relevant benchmarks for interpreting persecution. Whilst treaty bodies provide authoritative interpretations of human rights provisions, uncritical acceptance of their work appears, however, controversial. As such, there is no clear evidence that the normative activity of treaty bodies could encourage more consistency in the interpretation of the notion of persecution.

Overall, whilst many authors have supported the positivist views adopted by Hathaway on the basic human rights framework, an overview of the criticisms relating to its practical scope raises concern for the protection of refugees. Not only does it appear to constitute a vague interpretive scheme, but it also confines the experiences of refugees to a limited set of rights through a rather formalist approach. As such, the interpretive exercise

¹¹⁹ See extensive reliance on the jurisprudence of the HCR in the UNHCR Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 3 December 2013, HCR/GIP/13/10/Corr.1, 3.

¹²⁰ On the work of the HRC on LGBTI rights, see Paula Gerber and Joel Gory 'The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?' [2014] 14 Human Rights Law Review 403.

encouraged by the basic human rights framework might raise the risk of disregarding important aspects of refugees' circumstances in today's world and of contributing to the criticisms that the 1951 Convention is an inadequate instrument.

B) Quantitative aspect of persecution

i- Sustained and systemic approach: a restrictive threshold?

In addition to the qualitative aspect analysed above, Hathaway proposed a test to assess the quantitative aspect of serious harm. For him, only the most egregious forms of human rights violations should warrant refugee status, namely violations that are 'sustained' or 'systemic'. However, his approach has been widely criticised for being too strict as his formulation indicates that, in most cases, a single violation of a basic human right would not be enough to amount to persecution. In opposition to Hathaway, Storey argued that the requirement of a sustained or systemic violation of human rights sets an unduly high threshold for interpreting the notion of persecution and 'is plainly too restrictive'.¹²¹ The condition of persistency seemed also to have been rejected by other scholars. For instance, Goodwin-Gill did not retain this criterion when he analysed the concept of persecution. For him, 'persecution within the Convention [...] comprehends measures, taken on the basis of one or more of the stated grounds, which threaten' a series of rights that he enumerates.¹²² He further stated that the 'nature and severity of the restriction'¹²³ should be taken into consideration when assessing what harms amount to persecution. Through such formulations, he omitted to explicitly mention the element of persistency, thus seemingly waiving it. In contrast, he stated that persecution should be a matter of 'degree and proportion',¹²⁴ and, therefore, he adopted a more moderate position.

¹²¹ Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' [2014] 26 International Journal of Refugee Law 272, 279.

¹²² Goodwin-Gill and McAdams (n 65) 93.

¹²³ Ibid, 92.

¹²⁴ Ibid 92.

Although Carlier is a proponent of Hathaway's basic human rights approach, he also did not maintain the criteria of persistency. Instead, he proposed a different threshold for assessing persecution as he considered that, in principle, the requirement of severity of harm must be high, but it should be 'relaxed' in certain situations.¹²⁵ He developed a test based on a sliding scale of proportionality depending on the nature of the rights violated.¹²⁶ Similarly, Foster barely discussed the test of 'sustained and systemic violations' of human rights¹²⁷ in her book. Although she agreed that violations of basic human rights can amount to persecution, she seemed to depart from the strict approach proposed by Hathaway as she did not propose any specific test for assessing the threshold of persecution. She simply argued that, ultimately, the assessment of whether some forms of harm amount to persecution should be relinquished to asylum decision makers. For her, human rights simply provided a form of guidance that should not be understood in a rigid manner,¹²⁸ which is in contrast to the persistency criteria of Hathaway.

Given the overwhelming criticisms against the restrictiveness of his test, Hathaway refined his position in 2014. He stated that his definition of persecution could in fact entail instances of a single harm. For him, the term 'sustained' refers to an ongoing form of harm such as 'death or severe torture' and the term 'systemic' refers to a form of harm that is 'endemic in a social or political system'.¹²⁹ Even if Hathaway admitted that a single harm could rise to the level of persecution, the threshold that he sets appears to be, nonetheless, particularly severe. Indeed, the 'ongoing' nature of harm, remains a relatively vague notion and could result in applying an excessively strict test. For instance, he refers to 'severe torture', which implies the existence of different degrees in the infliction of torture. This could lead to the conclusion that a 'simple' act of torture, not severe enough, would not amount to persecution, which seems rather restrictive. Additionally,

¹²⁵ Carlier (n 14) 50.

¹²⁶ Ibid 45.

¹²⁷ Foster (n 12).

¹²⁸ Ibid 79.

¹²⁹ Hathaway and Foster (n 1) 195.

Hathaway did not explain to what extent he considers that a harm should be endemic in the society. This could in turn suggest that certain forms of harm that are not widespread enough in some communities, but that nonetheless affect some individuals, would not amount to persecution. As such, his test remains unduly severe.

ii- The basic human rights approach: a formalist threshold

In addition to the above, it should be pointed that the basic human rights approach relies on a formalist view of what persecution is by considering that individuals ought to enjoy only certain types of entitlements listed in international treaties. This approach could in turn lead to a rather compartmentalised understanding of persecution as it encourages to consider different aspects of harms in an abstract manner and to posit that one single threshold is applicable to everybody. Foster had pointed to this caveat, in the context of claims based on social and economic deprivation, as she noted that the ‘problem with any approach that is based on categorical distinctions is that it can lead to a rigid analysis, which fails to take into account the reality of the particular circumstances of the individual applicant and the interconnectedness of levels of rights’.¹³⁰ Storey also warned that a human rights approach for interpreting persecution should not obviate contextual considerations of the personal circumstances of individuals. According to him, persecution has to be ‘person-specific’ so that ‘not every violation of human rights will have equally serious consequences for different individuals’.¹³¹ Both authors cautioned against a formalist understanding of the threshold of persecution, detached from the context of its application. They demonstrated that the level of severity of a harm can be experienced differently depending on the context, the individual concerned and the existence (or not) of certain vulnerabilities. As such, even though they remained staunch proponents of a human rights approach, they introduced an element of subjectivity in assessing the concept of persecution. Their views

¹³⁰ Foster, (n 12) 147.

¹³¹ Hugo Storey, ‘Persecution: Towards a Working Definition’ in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 459-518, 476.

indirectly pointed to the fact that the threshold of harm required to amount to persecution might vary from one case to another.

In line with the above analysis, other authors also pointed out that a formalist understanding of persecution could lead to applying inadequate thresholds to the notion of persecution, that could be either too low¹³² or too high by disregarding certain aspects of the harms endured by applicants.¹³³ This caveat was particularly concerning under the former basic human rights framework developed by Hathaway that was based on a hierarchy of rights. Fortunately, this narrative has been abandoned in the latest edition of the LORS, allowing for more flexibility in interpreting the notion of persecution. However, the above criticisms rightly highlighted a general concern that any formalist narrative based on a categorical approach risks obviating a more circumstantial dimension of persecution. As such, caution should be exerted when relying on an interpretive framework that only refers to external normative standards for interpreting a notion that touches upon personal aspects of refugee claims.

Part 3) The surrogacy principle as part of the persecution test?

Another important modality of Hathaway's test is the notion of state protection. Through his formulation, Hathaway argued that the harm perpetrated on an individual should be 'demonstrative of a failure of state protection'. Hathaway here affirms the principle of surrogacy, by emphasising that international protection is warranted only when the state of origin does not provide adequate protection to victims of human rights violations. It will be demonstrated that his view on surrogate protection has been wrongly equated with the test of persecution for it adds an extra burden of proof on claimants (A). Additionally, it will be pointed out that his approach to the relationship between Internal Flight Alternative (IFA),

¹³² Symes & Jorro, 'Asylum Law and Practice', 88 quoted in Storey *ibid*.

¹³³ 'X, Y and Z: a Glass Half Full for "Rainbow Refugees"?' The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in *X, Y and Z v. Minister voor Immigratie en Asiel*, *International Commission of Jurists*, 3 June 2014 available at : <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/CommentaryXYZ-Advocacy-2014.pdf> at [48] the ICJ speaks of a 'narrow compartmentalisation of human rights'.

surrogacy principle and persecution provides for a convoluted framework. Others views on how the notion of IFA and persecution could be better articulated will be considered below (B) to conclude that persecution, the principle of surrogacy and IFA should remain separate concepts.

A) The notion of state protection wrongly equated with the test of persecution?

For Hathaway, refugee law is a form of ‘substitute protection’¹³⁴ and is meant to ‘interpose the protection of the international community [...] in situations where there is no reasonable expectation that national protection of human rights will be forthcoming’.¹³⁵ As a result, he makes the notion of persecution conditional upon the absence of state protection. It has been pointed, however, that this view was quite ambiguous given that a similar principle was already mentioned in the refugee definition of the 1951 Convention in a separate limb relating to the lack of national protection in one’s country.¹³⁶ As such, Hathaway’s definition of persecution further emphasises the surrogate character of asylum and provides a different understanding of the additional element of state protection mentioned in the definition. Goodwin-Gill’s view on this point diverged from Hathaway’s as he considered that there is a clear distinction between the ‘well-founded fear of being persecuted’ and the lack of state protection concepts. He observed that ‘the Convention definition begins with the refugee as someone with a well-founded fear of persecution, and only secondly, as someone who is unable or unwilling, by reason of such fear, to use or take advantage of the protection of their government’.¹³⁷ He therefore contended that ‘the point of reference is the individual particularly as a right-holder, rather than the system of government and its efficacy or intention in relation to protection’.¹³⁸ According to him, equating state protection with persecution adds an extra burden to the applicants and ‘downplays’ the individual fear of

¹³⁴ Hathaway and Foster (n 1) 292.

¹³⁵ Ibid 292.

¹³⁶ According to the refugee definition, a refugee is someone who is be ‘unable, or owing to such fear, is unwilling to avail himself of the protection of that country’.

¹³⁷ Goodwin-Gill and McAdams (n 65) 10.

¹³⁸ Ibid.

persecution.¹³⁹ Goodwin-Gill in fact associated the notion of surrogacy of state protection with the overall notion of international protection rather than with the persecution limb of the refugee definition.

On this point, Cantor also departed from Hathaway's view. He considered that 'from the perspective of the rules of treaty interpretation, [Hathaway's] approach unsatisfactorily ignores the plain text of the definition'.¹⁴⁰ Cantor lamented that Hathaway had 'little to say about the element of the Convention refugee definition that refers specifically to state protection' ('unwilling or, owing to such fear, is unable to avail himself to [state] protection')¹⁴¹ as he rather subsumed this element under the persecution test. Cantor develops a different paradigm to define the concept of surrogacy. He observed that the overall text of the 1951 Convention defines surrogate protection in relation to protection standards attached to effective nationality. He noted that the 1951 Convention sets protection standards for refugees in the host countries that are not predicated upon human rights law. The external surrogate protection as he theorised it, is not premised on the human rights paradigm but rather on protection standards in the context of alienage or diplomatic protection. In particular, he noted that the Convention makes a distinction between the rights afforded to citizens and the rights afforded to refugees, that are akin to the rights afforded to aliens. The rights afforded to aliens are restricted in comparison to the rights of citizens which is against the character of human rights that are normally universal and indivisible. Cantor stressed the difference between refugee protection and human rights protection by stating that 'in contrast to the particular nature of each of these forms of protection – i.e. national protection and refugee protection – the concept of human rights is rooted in considerations that apply to all human beings'.¹⁴² This observation led him to conclude that 'human rights law struggles to adequately describe the nature of national protection by the country of origin [...] or the quality of protection afforded by refugee

¹³⁹ Ibid.

¹⁴⁰ Cantor (n 29) 360.

¹⁴¹ Ibid.

¹⁴² Ibid 370.

status'.¹⁴³ Therefore, he argued that the absence of state protection should be understood in broader terms, including the protection afforded to the nationality holders (in the context of alienage). He further observed that persecution is a separate concept and that 'ultimately the persecution element is simply not capable of exhaustively describing the form of surrogate protection provided by refugee law'.¹⁴⁴ Cantor here demonstrated that persecution and surrogate protection are distinct, and that persecution cannot be considered the 'root'¹⁴⁵ of surrogate protection, as Hathaway suggested. For him, this observation is all the more valid since surrogate protection should not be read in human rights terms as argued by Hathaway.

B) Persecution: a bifurcated approach to the Internal Flight Alternative (IFA) test?

Whilst Cantor was right to point out that Hathaway dealt with the notion of 'lack of state protection' under the persecution limb of the Convention, thus seemingly ignoring the plain text of the Convention, his observation that Hathaway had little to say on the phrase 'unable, or owing to such fear, is unwilling to avail himself of the protection of that country' appears quite severe. In fact, Hathaway elaborated on this portion of the refugee definition in a separate chapter dedicated to the internal protection alternative¹⁴⁶ (also considered IFA as per the UNHCR's official formulation).¹⁴⁷ He observed that according to the refugee definition, when someone can 'avail himself of the protection of [the home] country',¹⁴⁸ refugee status is not warranted. In order to explore this element, Hathaway suggested applying an IFA test, by enquiring whether state protection is available in another area of the home country. If state protection is available in a different place than the place of origin of an applicant, then the applicant does not meet the eligibility criteria for refugee status. Hathaway seemed to

¹⁴³ Ibid.

¹⁴⁴ Cantor *ibid* 363.

¹⁴⁵ Ibid.

¹⁴⁶ Hathaway and Foster (n 1) 332.

¹⁴⁷ Guidelines on International Protection No. 4: 'Internal Flight or Relocation Alternative Within the Context of Article 1A(2) of the 1951 Convention and/or Protocol Relating to the Status of Refugees', HCR/GIP/03/04, 23 July 2003.

¹⁴⁸ Hathaway and Foster (n 1) 332.

disconnect the IFA test from the persecution enquiry, thus applying a convoluted understanding of the notion of surrogate protection that is subsumed into two different elements (one is an inherent part to the notion of persecution and one is external). To add to the complexity of his framework, Hathaway suggested departing from the human rights narrative initially proposed for the notion of persecution. Instead, he considered that IFA should be interpreted in light of ‘the provision of legal entitlements and rights of the kind set by the Convention’¹⁴⁹ thus further re-joining Cantor on this element. According to him, the legal entitlements of refugees under the Convention constitute the only benchmarks against which the level of state protection expected for an IFA enquiry should be assessed. He therefore developed two different paradigms for different aspects of the same refugee definition, thus creating a confusing interpretive scheme. This deficiency has been highlighted by Storey who claimed that ‘not to apply a human rights approach to the IFA test has increasingly apparent disadvantages. It is difficult to square with the growing consensus in contemporary case law that the concepts of persecution and protection require a human rights reformulation’.¹⁵⁰

In an attempt to provide a more coherent approach, the UNHCR has developed an entirely different paradigm for interpreting the notion of IFA, by considering that it is part of a holistic assessment attached to the overall refugee definition.¹⁵¹ The UNHCR therefore made clear that the IFA test and the notion of internal state protection is not an inherent component of the persecution element. In the guidelines on IFA, the UNHCR considered that the IFA test is an additional two-pronged test requiring that it should be both ‘relevant and ‘reasonable’¹⁵² for an applicant to relocate to another area of the home country. In order to assess whether a relocation is reasonable, the UNHCR suggested that a claimant should not experience ‘undue hardship’ in the proposed area. The Refugee Agency also proposed that this notion could be interpreted in light of international human rights.¹⁵³ With the

¹⁴⁹ Ibid 355.

¹⁵⁰ Hugo Storey, ‘The Internal Flight Alternative Test: The Jurisprudence Re-examined’ [1998] 10 International Journal of Refugee Law 499, 529.

¹⁵¹ UNHCR (n 147) 3.

¹⁵² Ibid.

¹⁵³ Ibid at [24].

reasonableness criteria added to the IFA requirement, the UNHCR established a threshold that is much lower than the one proposed by Hathaway.

Kelley has however criticised the UNHCR framework for interpreting IFA. Although she admitted that it is quite broad, she also pointed to the vague and general character of this approach and the subsequent risk of inconsistent applications in domestic jurisdictions.¹⁵⁴ Additionally, Kelley raised concerns with regards to Hathaway's position - formalised in the Michigan Guidelines - as she observed that 'the guarantees in the Convention become the ceiling rather than the floor upon which guarantees found in later human rights treaties build',¹⁵⁵ making the test quite restrictive. She, therefore, proposed an alternative approach, using only human rights as benchmarks for interpreting the IFA concept. This view is similar to the position of Storey who contended that using human rights for the test of IFA is more consistent with the human rights narrative for interpreting persecution and offers a more objective basis to the IFA enquiry.¹⁵⁶ He further specified that using the same benchmarks as persecution does not necessarily imply that the same threshold should be applied. For him, the test of IFA, through the 'unduly hardship' approach implies that the harm faced in the relocation place should be less severe than persecution.¹⁵⁷ Storey also adopted a broader view of the notion of persecution by considering that IFA could be linked to the notion of persecution, but not equated with it. According to him, the causal link that exists between the initial feared persecution and the harm or undue hardship that could be faced in a relocation place suggests that IFA could be considered a form of 'indirect persecution'.¹⁵⁸ Through this view, Storey reconnects both notions. In any event, he criticised any restrictive approach of the notion of IFA as he believed that it would not be congruent with the intention of the

¹⁵⁴ Ninette Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?' [2002] 14 *International Journal of Refugee Law* 4, 23.

¹⁵⁵ Kelley *ibid* 35.

¹⁵⁶ Storey (n 150) 529-530.

¹⁵⁷ Storey (n 131) 477.

¹⁵⁸ Storey (n 150) 527.

plenipotentiaries who considered that the Convention should be interpreted in a 'liberal and humanitarian spirit'.¹⁵⁹

The foregoing has demonstrated that ample disagreement was raised regarding the relation between the tests of persecution, state protection and IFA. According to Hathaway's interpretive framework, the notion of internal state protection should always be part of the persecution limb, whilst the possibility of IFA is separated and interpreted through a different paradigm, thus lacking conceptual clarity. In order to develop clearer approaches, some authors have proposed to entirely separate the surrogacy and IFA elements from the interpretation of the notion of persecution. In particular, the proposal made by the UNHCR¹⁶⁰ that the existence of IFA should be linked to the overall sentence 'well-founded fear of being persecuted' appears valuable as it could lift any confusion. It alleviates the burden of proof on claimants and appears more in line with the plain meaning of the refugee definition.

Part 4- Conclusion

Extensive literature has been produced on the interpretation of the refugee definition and, particularly on the notion of persecution. However, some approaches developed interpretive models that do not align with the evolutionary understanding that should be given to the notion of persecution. In particular, the basic human rights framework elaborated by Hathaway in the LORS has been largely commented on and, in recent years, arguments have been voiced to demonstrate that this framework does not always provide an adequate answer for the changing protection needs of refugees. Firstly, the benchmarks that he proposed, namely basic human rights codified in international treaties, raise a number of difficulties because they cover a minimal range of individuals' experiences. Indeed, this chapter has highlighted the existence of normative gaps in international human rights law, indicating that formal treaties might not be sufficient to adapt to the evolving priorities of refugees. Secondly, it was pointed out that the vague and general

¹⁵⁹ Storey *ibid* 501.

¹⁶⁰ UNHCR (n 147) at [3].

character of basic human rights does not seem adequate to solve the problem of inconsistent applications of the 1951 Convention. Additionally, Hathaway's test to assess the severity of the harm required has been deemed unduly strict and has been generally rejected by scholars. Lastly, his approach to surrogate protection and IFA has also been debated. It has been demonstrated that considering state protection as an inherent part of the test of persecution could lead to rather restrictive interpretations of the notion of persecution that are not consistent with the protective purpose of the Convention.

Overall, this chapter has attempted to demonstrate that the dominant perception that refugee protection equates with surrogate human rights protection raises conceptual difficulties. Different opinions on the role that human rights should play in interpreting the notion have been expressed and authors do not seem to agree on the various modalities of a human rights interpretive framework. As put by Cantor, 'the sheer variety of human rights-based approaches to Article 1A(2) that are currently discernible in refugee law practice and scholarship calls into question the existence of a single interpretive paradigm'.¹⁶¹ This in turn questions the validity and utility of Hathaway's narrative. Whilst the necessity of a principled approach has been widely accepted by commentators, one might wonder whether this approach should maintain a basic human rights narrative or whether a new paradigm is desirable.

It should not be concluded from the above criticisms that human rights law is irrelevant for interpreting the refugee definition today. It can indeed provide, in certain cases, normative references for assessing what forms of harm amount to persecution and constitute an objective guidance that has reached a certain consensus on the international scene. However, as Toufayan put it, treaty interpretation 'far from being the accounting of raw interpretive data or the prioritisation of certain interpretive means over others

¹⁶¹ Cantor (n 29) 392.

[.] is in reality a holistic construct'.¹⁶² In order to develop this holistic construct, other legal tools are, therefore, needed. For this purpose, alternative approaches for interpreting the notion of persecution have been proposed and will be analysed in the following chapter.

¹⁶² Mark Toufayan, 'Human Rights Treaty Interpretation: A Postmodern Account of its Claim to "Speciality"' (Center for Human Rights. & Global Justice, Working Paper No. 2, 2005), quoted by John Tobin in 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation'[2010] 23 Harvard Law Journal 1, 10.

Chapter 3: Alternative proposals to the basic human rights approach for interpreting the notion of persecution

A general overview of the literature has demonstrated that a framework based on basic human rights for interpreting the notion of persecution - as proposed by Hathaway - constitutes a coherent and principled approach but, at the same time, it suffers from inherent limitations. In particular, the formalist methodology proposed by the basic human rights model does not appear to sufficiently take into account the various circumstances of refugees and, does not solve the problem of inconsistent interpretations of the Convention, as pointed out by many authors. It might, therefore, be wondered whether an alternative paradigm for interpreting persecution should be developed in order to overcome these deficiencies?

The present chapter will explore alternative models for interpreting persecution in order to evaluate how persecution can remain relevant in the 21st century. The first part of this chapter will analyse the development of alternative narratives for interpreting persecution based on models that have proposed expanding the basic human rights paradigm (Part 1), such as the definition developed by the Qualification Directive (QD) of the European Union and the framework proposed by Storey. However, it will be contended that none of these models are found adequate. A second part will then consider alternatives models that adopted a more subjective or circumstantial analysis of the situation of refugees by emphasising other aspects of persecution (Part 2). It will be eventually argued that a holistic approach, taking into consideration the basic protection needs and the personal circumstances of refugees, might be desirable to assess the level of harm that individuals are likely to face upon return to their country in a more accurate and transparent manner. This view does not imply that external benchmarks, such as basic human rights norms, should be disregarded. They can indeed be factored into the assessment of what amounts to persecution, but they should not be used as primary and unique elements for analysing persecution because

relying on abstract concepts risks obviating some protection needs of refugees.

Part 1) A severe violation approach: an expanded basic human rights model?

As demonstrated in the previous chapter, the model proposed by Hathaway has been rejected by many authors for being either too formalist or too restrictive. European law has developed an alternative approach by expanding this human rights framework in order to take into account different forms of restrictions and encourage a more holistic analysis of the notion of persecution. The parameters of the European framework will be evaluated below together with a detailed analysis of the European jurisprudence that this model has generated (A). Storey's proposal to expand the QD narrative in order to include any relevant norm of international law as interpretive benchmarks¹ will be also considered (B).

A) The Qualification Directive of the European Union: first treaty to provide a definition of persecution in refugee law

i- A severe violation approach

EU countries agreed in 1999, at the Tampere Summit, to create a Common European Asylum System (CEAS), in order to set minimum standards for harmonising asylum systems in Europe.² One of the major instruments of the CEAS is the QD that established eligibility criteria for

¹ Hugo Storey, 'Persecution: Towards a Working Definition' in V. Chetail and C. Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 459-518.

² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; Directive 2003/9/EC of the European Parliament and of the Council of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints.

determining who is entitled to receive international protection. McAdam noted that, for the first time in Europe, the QD elaborated ‘a distinct status for extra-Convention refugees’.³ The QD, however, did not establish a self-contained regime separate from international refugee law. In fact, the directive drew extensively upon the provisions of the 1951 Convention to develop a European system of protection in line with international standards. Indeed, for Lambert, the QD is an instrument that directly ‘goes to the heart of the 1951 Convention Relating to the Status of Refugees’ and, as such, constitutes ‘the most important instrument in the new legal order in European asylum’.⁴

One of the most significant innovations of the QD is the development of a binding definition of the notion of persecution. Article 9 of the Directive states that persecution consists either in a ‘severe violation of basic human rights’, or in various measures that would have the same effect. Article 9(1) stated that ‘(a)cts of persecution [...] must’:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Further to this, Article 9(2) goes on to enumerate, in a non-exhaustive manner, different types of harms that could be considered persecutory. By establishing a clear list of harms that could fall within the ambit of the notion

³ Jane McAdam, ‘The Qualification Directive: An Overview’, in Karin Zwaan (eds), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, (Nijmegen: Wolf Legal Publishers 2007) 8-30, 8.

⁴ Hélène Lambert, ‘The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law’ [2006] 55 *International and Comparative Law Quarterly* 161, 161.

of persecution, the QD provides specific and concrete guidance for decision makers. In particular, the UNHCR welcomed these examples as positive clarifications of certain grey areas of refugee law.⁵

Through Article 9, the QD is the first international instrument that officially endorsed the basic human rights narrative initially proposed by Hathaway.⁶ The modalities of this interpretive framework are, however, quite different to the ones suggested by the author. The QD abandoned the persistency criteria of harm and referred to ‘severe violations’ rather than ‘sustained or systemic’ violations. In addition to this, the QD expanded the definition of Hathaway by adopting a broader view that takes into consideration various forms of predicaments, also amounting to a severe violation of a basic human right. By considering the consequences that various other measures can have on an individual, the QD seemed to adopt a more pragmatic approach and encouraged decision makers to take into consideration a larger number of restrictions to assess the gravity that various restrictions have on an individual’s life. This approach is, however, limited by the reference to external benchmarks, as the QD stated that, in order to amount to persecution, such restrictions should affect an individual in a manner similar to ‘severe violations of basic human rights’. By setting a fixed threshold based on basic human rights norms, the QD therefore minimised the subjective approach and made the notion of ‘basic human rights’ the keystone of the definition of persecution.

The definition proposed by the QD, whilst more flexible than the human rights framework developed by Hathaway, raises some conceptual difficulties. In particular, Lehman observed that the formulation used in the QD poses questions such as ‘what is a “basic” human right and how should severity be determined’?⁷ Indeed, the QD relies extensively on the notion of

⁵ UNHCR, ‘UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted’ (OJ L 304/12 of 30.9.2004) (January 2005) 21.

⁶ Storey (n 1) 478. See also McAdam (n 3) 11: The Qualification Directive ‘reflects very strongly Hathaway’s human rights approach to “persecution”.’

⁷ Julian M. Lehmann, ‘Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – The Case of Germany v Y and Z in the Court of Justice of the European

‘basic human rights’ to define persecution but there is no authoritative definition of what a ‘basic’ human right is in international law, thus causing some uncertainty as to which benchmarks should be used for interpreting persecution. Some guidance on how to identify a basic human right can be found in article 9(1)(a) of the QD that refers to non-derogable rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, the term ‘in particular’, used in the definition, implies that these non-derogable rights are essentially illustrative and that other benchmarks could be also referred to. There is unfortunately no further clarification on this point. This ambiguity is concerning as it could allow restrictive interpretations of the notion of persecution. Klug, for instance, noted that the formulation of the QD ‘bears the danger of a minimalistic approach, restricted to the rights mentioned in Article 15 para. 2 of the ECHR’.⁸ For her, the QD does not encourage ‘an interpretation of the term “persecution” from a broader human rights’ perspective.⁹

Whilst guidance on the meaning of those rights can be found in the jurisprudence of the European Court of Human Rights (ECtHR), Lehman noted that such guidance might not be adequate for refugee law purposes. In particular, he mentioned that according to the ECtHR, ‘basic’ human rights are rights that have a non-refoulement dimension,¹⁰ and that this non-refoulement dimension is assessed through a nebulous narrative, notably by referring to the notion of ‘flagrant breach’ or ‘flagrant denial’ of core elements of certain rights. Lehman argued that this framework is rather general and does not provide sufficient indication for assessing the threshold of persecution in refugee law. According to him, the ‘flagrant denial’ and ‘flagrant breach’ doctrine constitutes an ‘abstract rationale for a particular seriousness’ and provides ‘little further guidance’¹¹ on how to identify what

Union’ [2014] 26 *International Journal of Refugee Law* 65, 71.

⁸ Anja Klug, ‘Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?’ [2004] 47 *German Yearbook of International Law* 594, 602.

⁹ Klug *ibid* 62.

¹⁰ Lehmann (n 7) 72.

¹¹ Lehmann *ibid* 73.

is the ‘core’ of a right and what a basic human right is. He also pointed out that the jurisprudence of HRC is unclear in this field.¹²

Whilst the guidance of the ECHR for identifying basic rights remains indeed confused, it could be further argued that the threshold proposed by the ECHR appears, in any case, inadequate because it is particularly severe. The non-refoulement dimension of certain rights seems to set a test that is too strict. Indeed, it significantly limits the array of rights that could be referred to and relies on notions that are very general. In this sense, Juss noted that the ‘flagrant breach’ doctrine sets an ‘unrealistically high threshold’.¹³ Costello also pointed to the limited ambit of the ‘flagrant breach’ theory of the ECHR in refugee law cases. For her, ‘refugee law can offer better protection than the ECHR in important aspects’.¹⁴ An example of how the non-derogable or non-refoulement rights’ narrative has unduly limited the application of the refugee Convention will be assessed below by considering the recent caseload of the Court of Justice of the European Union (CJEU).

Another concern justly pointed out by Lehman in the definition of article 9(1)(a) is that the test that it proposes, namely ‘severe violations’, is also quite vague. For him, external guidance either in the ECHR or in the HCR, does not provide more precision.¹⁵ One could therefore wonder whether the wording of Article 9(1)(b) could present more indications as to the degree of harm expected. On this point however, Article 9(1)(b) seems to set a rather high threshold again. This portion of the definition refers to certain rights that are ‘sufficiently serious by their nature or repetition’ as to amount to persecution, but then goes on to refer to ‘non-derogable rights’¹⁶ to assess the level of harm required. This might indicate that one violation of a non-derogable right that is not either serious or repeated, might not suffice to

¹² Lehmann *ibid* 73: The HCR developed the theory that there is a core of each right that needs to be taken into consideration and that, in certain cases, can never be derogated. The question that arises here is whether these non-derogable dispositions could be considered ‘basic human rights’ in the words of the QD. Lehman rejected this idea by pointing at the deficiencies of this approach due to the fact that there ‘is no agreed-upon and consistent method for identifying the non-derogable cores of rights’. In general, he convincingly concluded that human rights law ‘does not provide a conclusive answer to what “basic” human rights are’.

¹³ Satvinder. S. Juss, *International Migration and Global Justice* (Ashgate, Aldershot, 2006) 204.

¹⁴ Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 197.

¹⁵ Lehmann (n 7) 73.

¹⁶ Through the formulation: ‘in a similar manner as (a)’.

constitute persecution. As such, it remains unclear how milder violations of non-basic human rights should be treated. By stating that they should affect an individual in a similar manner as a severe violation of a basic human right, the QD maintains a rather rigid and vague test. Additional guidance could be found in Article 9(2) but this list simply defines the forms that persecution can take and does not really say much about the degree of harm required to amount to persecution.

In contrast to the above criticisms, Labayle argued that Article 9(1)(a) is quite clear and specific. He believes that this article should be interpreted as only covering the non-derogable rights under Article 15 of the ECHR¹⁷ in order to constitute a well-defined framework of interpretation. However, Labayle did not seem to take into consideration the plain text of Article 9. As above mentioned, Article 9 specifically stated that, ‘in particular’, non-derogable rights should be used as benchmarks. The ‘in particular’ limb suggests that other human rights norms could also be relevant for assessing the notion of persecution. For Cantor, the non-derogable rights of the ECHR mentioned in the QD constitute only a ‘minimum threshold’ to evaluate what amounts to persecution¹⁸ and implied that a wider array of rights could be also relevant for interpreting the notion. In line with Cantor’s position, it appears more reasonable to consider that the non-derogable rights should be viewed as a safety net for applying the refugee definition but not as rigidly delineating the parameters of the interpretive framework. Otherwise, the QD definition would adopt a particularly restrictive approach.

Bearing the above limitations in mind, the UNHCR warned against a strict interpretation of the QD that would only rely on a formalist framework based on codified human rights. In its annotated comments on the text of the QD, the UNHCR stated that:

¹⁷ Labayle Henri, ‘Le Droit d’Asile devant la Persécution Religieuse: la Cour de Justice ne se Dérobe pas’, Réseau Universitaire Européen Droit de l’Espace de Liberté, Sécurité et Justice, 9 Sept 2012 available at: <<http://www.gdr-elsj.eu/2012/09/09/asile/le-droitdasile-devant-la-persecution-religieuse-la-cour-de-justice-ne-se-derobe-pas/>>

¹⁸ James Cantor, ‘Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm’ in Bruce Burson and Cantor David James (eds), *Human Rights and the Refugee Definition*, Comparative Legal Practice and Theory (Brill Nijhoff 2016) 349-395, 383.

‘while international and regional human rights treaties and the corresponding jurisprudence and decisions of the respective supervisory bodies influence the interpretation of the 1951 Convention, persecution cannot and should not be defined solely on the basis of serious or severe human rights violations’.¹⁹

According to the UNHCR, the assessment of persecution under the QD is to be undertaken on a case-by-case basis, in a more holistic manner. The refugee agency indeed recommended that, in general, different factors should be assessed in order to determine whether certain measures ‘make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of the predicament is to leave the country of origin’.²⁰ The UNHCR criticised the strict and ambiguous test established by the QD in its definition of persecution and recommended that more emphasis should be put on the impact that various measures, regardless of their nature, have on the daily life of an individual. Whilst the QD indeed focuses mostly on the nature of human rights violations, the UNHCR proposes to shift the paradigm by instead considering the consequences that these various measures have on someone’s life. This position was supported by other authors who considered that the QD developed a human rights narrative that is too rigid and disregards the subjective and personal circumstances of refugees.²¹

ii- The restrictive guidance of the CJEU on the notion of persecution

As mentioned above, the definition of the QD remains, to a certain extent, ambiguous. Therefore, after it was adopted, there was a great hope²² that the CJEU would provide more a detailed guidance²³ in order to

¹⁹ UNHCR (n 5) 20.

²⁰ Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, SCIFA (Brussels, 6 November 2002) available at: <http://www.unhcr.org/admin/dipstatements/42bab1b52/statement-ms-erika-feller-director-department-international-protection.html>

²¹ Klug (n 8) 603: According to Klug, the joint proposal presented a better alternative by emphasizing the importance of the subjective element of persecution.

²² Roland Bank, ‘The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law’ [2015] 27 International Journal of Refugee Law 213, 215.

²³ Treaty on the Functioning of the European Union (TFEU), Art 267.

harmonise different approaches in member states. Since 2004, the CJEU has issued three main decisions that analysed the notion of persecution in light of Article 9. Unfortunately, in these decisions, the court also adopted a restrictive interpretation of persecution, which departed from the protection purpose of the 1951 Convention.

In *Bundesrepublik Deutschland v. Y and Z*²⁴ on 5 September 2012, the Federal German Court requested the CJEU to determine to what extent a violation of the right to freedom of religion constituted a persecutory act in the context of an asylum request made by two Pakistani applicants belonging to the Ahmadi religious minority.²⁵ The court started by rejecting the traditional German doctrine that considered that there was a ‘core’ to each human right and that, such a core was necessary to determine whether certain measures amounted to persecution. The CJEU decided, instead, that all sorts of acts interfering with a basic human right - in the present case, the freedom of religion - needed to be taken into account in order to interpret persecution. In this sense, it adopted a broader approach than in the German courts. The European judges then added that a more pragmatic approach should be adopted for evaluating the gravity of a harm as they considered that both the nature of the restrictions and the consequences that they have on an individual should be factored into the assessment of persecution.²⁶ For the judges, what mattered was the severity of the restriction, not the restriction itself.²⁷ Whilst European judges seemed to initially develop a broad understanding of the QD by straying away from the ‘core’ human rights doctrine, they then narrowed

²⁴ *Bundesrepublik Deutschland v Y and Z*, C-71/11, C-99/11 (CJEU 5 Sept 2012).

²⁵ Bruce and Cantor observed that it was the very first time that a supranational court endorsed the human rights approach for interpreting the notion of persecution: Burson Bruce and David James Cantor, ‘Interpreting the Refugee Definition via Human Rights Standards’, Chapter 1 in Bruce Burson and Cantor David James (eds), *Human Rights and the Refugee Definition, Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 1-24, 9.

²⁶ *Bundesrepublik Deutschland v Y and Z* (n 24) at [65].

²⁷ See Alexandra Maria Rodrigues Araújo, ‘The Qualification for Being a Refugee under EU Law: Religion as a Reason for Persecution’ Court of Justice of the European Union (Grand Chamber), Judgment of 5 September 2012, Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z* [2014] 16 European Journal of Migration and Law 553, 546: ‘the Court adopted the following touchstone: it is the severity of the measures and sanctions adopted or the liability to be adopted against the person concerned which will determine whether a violation of religious freedom constitutes persecution (...) the Court established that the acts regarded as constituting persecution must not be judged on the basis of the particular aspect of religious freedom that is being interfered with, but on the basis of the intrinsic severity of the repression inflicted on the individual and the severity of its consequences’.

down their views by imposing a very high degree to the harm required as they stated that persecution was only characterised if ‘an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment’.²⁸ Through this formulation, the court equated the notion of persecution with the severity of harm required under the non-refoulement principle of the ECHR and the 1951 Convention and relied on rather vague notions. Commentators criticised the severe threshold used by the court. For instance, Bank considered that the court established an ‘exceptionally high standard for an act of persecution’.²⁹ Other authors also noted that the test established by the court was rather unclear. For instance, Lehman considered that in ‘implicitly relying on the scope of non-refoulement under the ECHR’, the court endorsed ‘a very narrow, conceptually vague human rights approach to the notion of persecution’³⁰ and undercut ‘the autonomous and wider scope of harm relevant under the Convention’s refugee definition’.³¹ Araujo also observed that, after the court decision, some ‘level of uncertainty’ remained as to the threshold that should be applied in cases of religious persecution.³² Interestingly, in the present case, the European judges had pointed to the circumstantial dimension of persecution as they considered that it was necessary to assess the consequences that certain measures can have on an individual. Although this element could have further encouraged the judges to evaluate, in a holistic manner, the broad impact that certain restrictions have on claimants’ lives, the court unfortunately ended up restricting the scope of the QD by setting a very high threshold to the notion of persecution.

Regrettably, the court confirmed this restrictive approach in *Minister voor Immigratie en Asiel v X, Y and Z* on 7 November 2013.³³ In this case, the court had to examine the claim of two homosexual applicants, hailing from Sierra Leone and Uganda. The European judges found that the violation

²⁸ *Bundesrepublik Deutschland v Y and Z* (n 24) at [67].

²⁹ Bank (n 22) 226.

³⁰ Lehmann (n 7) 81.

³¹ Ibid 79.

³² Araujo (n 27) 556.

³³ *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 – C-201/12 (CJEU 7 Nov 2013).

of the right to private and family life did not in itself amount to persecution because this right was a derogable right.³⁴ The court concluded from this observation that:

‘the mere existence of a legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant(s) in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive’.³⁵

This approach was highly criticised by the International Commission of Jurists (ICJ), pointing out that the non-derogability of a right could not be equated with the concept of severity on which the notion of persecution rested.³⁶

Although the Court considered that penalisation did not amount to persecution, it stated that implemented penal sanctions, such as imprisonment, could constitute persecution. European judges then proposed to take into consideration ‘all the relevant facts concerning that country of origin’³⁷ in order to assess whether an applicant was at risk of facing persecution. They did not, however, specifically mention what kind of facts should be examined and seemed to propose only to refer to facts relating to the geopolitical circumstances in the country of origin, namely to external facts. Again, by not encouraging a more holistic assessment of the personal experiences of the claimants and affirming that penalisation of homosexuality did not per se amount to persecution, the judges adopted a narrow and rigid view of the refugee definition. The consequences that criminal laws have on the life of homosexuals should have been better highlighted in the judgment. Such laws might have devastating impacts on homosexuals who live in

³⁴ Ibid at 54.

³⁵ Ibid at [55].

³⁶ ‘*X, Y and Z: a Glass Half Full for Rainbow Refugees?*’ The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in *X, Y and Z v. Minister voor Immigratie en Asiel*, International Commission of Jurists, 3 June 2014 available at : <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/CommentaryXYZ-Advocacy-2014.pdf> at [49]

³⁷ *X, Y, Z v Minister voor Immigratie en Asiel* (n 33) at [58].

permanent distress and are not free to express their emotions and their sexual orientation in public as well as to enjoy the possibility of living freely with their partners. Unfortunately, the court overlooked this aspect. The judges adopted a ‘compartmentalised’³⁸ approach by encouraging a formalist assessment of abstract entitlements rather than adopting a more circumstantial methodology. The position of the court also disregarded the views of the UNHCR which considered that ‘even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGBTI person rising to the level of persecution’.³⁹ In reaction to this judgment, the ICJ and Amnesty International issued a joint statement criticising the reasoning of the court. The statement affirmed that legislation penalising homosexuality actually fosters social homophobia with the tacit approval of the authorities even when it is not applied in practice.⁴⁰ In light of the foregoing, it appears that the court adopted a narrow view of persecution again, and should have encouraged member states to engage in a broader analysis of the situation faced by homosexuals in their country, by considering for instance that the criminalisation of homosexuality, could, depending on the objective country conditions and the personal circumstances of claimants, raise a rebuttable presumption of persecution.

Not only did the cases mentioned above adopt a restrictive approach of the human rights narrative, but they also provided inconsistent guidance on what amounts to persecution, thus demonstrating that human rights law might not always resolve the problem of fragmentary jurisprudence. For instance, Heijer noted that the European judges gave contradictory information in relation to the requirement to conceal certain elements of one’s identity in order to avoid persecution. In *Y and Z*, the court indicated that the

³⁸ ICJ (n 36) at [57]: ‘the fact that consensual same-sex sexual orientation and/or acts are criminalized requires a thorough, individualized and holistic assessment – rather than a false and compartmentalized one – of whether these laws affect the lived experience of asylum applicants in their country of origin in such a way as to give rise to a well-founded fear of persecution’.

³⁹ UNHCR, Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 Oct 2012, HCR/GIP/12/01, at [27].

⁴⁰ Amnesty International, ‘Observations by Amnesty International and the International Commission of Jurists on the case *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*’ (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013, 2 October 2013, POL 33/003/2013.

personal circumstances of an applicant should be taken into consideration in order to assess whether he would engage in public practice of his religion. This indicated that, although it cannot be reasonably expected of someone to abstain from practicing her religion in public, she might also act discreetly as per her personal conviction and, as such, persecution might not apply. The language of the court was however different in *X, Y and Z*, as the European judges clearly stated that: ‘the fact that (the applicant) could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account’.⁴¹ In this case, the court adopted a more categorical approach in relation to the discreet attitude that one can be expected to have. It indicated that, under no circumstances should the evaluation of persecution be conducted with the eventuality in mind that one could try to avoid the harm feared. To Heijer, these different formulations demonstrate that ‘different tests apply to the persecution reasons of homosexuality and religion’.⁴² Heijer highlighted the absurdity of these solutions according to which it will ‘never be tolerable for a homosexual to conceal his identity, but it can be tolerable for a religious person to only worship in private’.⁴³ These inconsistent solutions in fact reflect the variable approaches that can be adopted under the QD, and to a broader extent under the human rights narrative.

In the previous cases, the court essentially dwelled on the interpretation of Article 9(1) but in *Shepherd*⁴⁴ it provided some guidance on the interpretation of article 9(2) when this article was the object of a set of questions referred to the CJEU by the High Administrative Court of Bavaria. The court had to examine the case of a former soldier who served for two years in Iraq as a helicopter maintenance mechanic. He eventually deserted because he considered that the war was illegal and because he believed that war crimes were committed by his army. He argued that because of his desertion, he was at risk of prosecution and social ostracism in his country of

⁴¹ *X, Y, Z v Minister voor Immigratie en Asiel* (n 33) at [75].

⁴² Maarten den Heijer, ‘Persecution for reason of sexual orientation: X,Y and Z’ [2014] 51 Common Market Law Review 1217, 1231.

⁴³ Heijer (n 42) 1231.

⁴⁴ *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, Case C-472/13 (CJEU, 26 February 2015).

origin. According to the QD Article 9(2), prosecution or punishment for refusal to perform military service may amount to persecution only when performing military service would involve the commission of crimes or acts falling under the exclusion clauses.⁴⁵ This approach is quite narrow as it overlooks any other personal motivation that a conscientious objector could have for not abiding by national obligations. Not only did the CJEU endorse this position, but it further limited the possibilities of granting asylum based on conscientious objection. The court posited new conditions to the granting of asylum in cases of desertion from the military, namely that the commission of crimes should be ‘highly likely’, that desertion should be the only way to avoid the commission of such crimes and that an endorsement of the conflict by the international community should be taken into account in assessing the possibility of committing war crimes. Unfortunately, the result of this conclusion was to heighten the burden of proof for asylum seekers.⁴⁶ Commentators criticised the position of the court by considering that the judges did not apply a broad human rights approach as required by the QD⁴⁷ and as recommended by the UNHCR. For instance, Vicini recently contended that the position of the CJEU in this case was ‘incompatible with recent developments within international human rights law, which progressively protect the right to conscientious objection as an essential part of the right to freedom of thought, conscience and religion’.⁴⁸ Additionally, the judges did not propose specific guidance as they did not clarify what they believed were the protected activities under human rights law, nor did they explain what infringements and limitations of such activities were admissible. In particular, the court seemed to accept that up to five years of imprisonment was acceptable for deserting the US army but did not justify why this would be so. The judges also did not engage in a holistic appreciation of what would be the exact nature of the harm feared in the country of origin of the applicant.

⁴⁵ The Qualification Directive, Art 9(2)e.

⁴⁶ *Andre Lawrence Shepherd v Bundesrepublik Deutschlan*, (n 44) at [46].

⁴⁷ Julian M. Lehmann, ‘Of Shepherds and Sheepdogs – Andre Lawrence Shepherd v. Bundesrepublik Deutschland before the Court of Justice of the European Union’, 9 March 2015, University of Michigan Law School blog, available at : <http://www.reflaw.org/of-shepherds-and-sheepdogs-andre-lawrence-shepherd-v-bundesrepublik-deutschland-before-the-court-of-justice-of-the-european-union/#>

⁴⁸ Giulio Vicini, ‘Conscientious objection to military service and the notion of persecution in European Union asylum law, the Shepherd Judgment of the Court of Justice of the European Union’ [2015] 13 Journal of International Criminal Justice 845, 859.

In light of the foregoing, it appears that the uncertainty raised by Article 9 of the QD regarding the definition of persecution has not so far been lifted by the CJEU. Although the court endorsed the basic human rights approach, it used human rights standards to, in fact, adopt narrow views of the notion of persecution. According to Cantor, in analysing ‘subtle questions about the boundaries of persecution’, the Court had ‘recourse to human rights [...] to serve as a justification for restrictive interpretations of this element’.⁴⁹ Indeed, the European judges failed to develop a detailed framework of interpretation in line with broader international norms and with the UNHCR’s recommendations. Instead, they made use of the vague wording of the QD to develop restrictive standards of interpretation. As a result, the highly difficult task of interpreting the QD pursuant to the spirit of the 1951 Convention still rests on the member states themselves without effective coordination, which further heightens the risk of inconsistent decisions within the European Union.

B) The Qualification Directive: a ‘template for a universal working definition’ of persecution?⁵⁰

In spite of the uncertainty surrounding the interpretation of its terms, the QD is the first international instrument that provides a detailed definition of persecution in the context of refugee law. As such, Storey considered that the QD could be used as a model for interpreting the notion of persecution at the global level. Unlike what has been argued above, Storey contended that the human rights narrative in the QD is adequate because it departs from the restrictive framework developed by Hathaway in 1991⁵¹ and provides a more expansive narrative. By removing the restrictive elements of Hathaway’s framework such as the four-tier hierarchy⁵² and the persistency criteria, Storey contended that the QD marked one ‘very significant improvement’.⁵³

⁴⁹ Cantor (n 18) 386.

⁵⁰ Storey (n 1) 478.

⁵¹ Ibid 470.

⁵² This element was also abandoned by Hathaway in the latest edition of the LORS in 2014.

⁵³ Storey (n 1) 472.

He also observed that the QD developed a broad scheme, by suggesting that ‘other measures’ than severe human rights violations could also amount to persecution. He observed that a greater variety of benchmarks could be taken into consideration for interpreting persecution and, therefore, he praised the new approach of the QD as being more flexible.⁵⁴ Whilst it is true that the QD proposed a paradigm that is broader than the definition initially developed by Hathaway, the optimistic vision of Storey has, however, been contradicted by the jurisprudence of the CJEU as previously demonstrated. The court has shown that the human rights paradigm adopted by the QD could also lead to very narrow interpretations of persecution, thus failing to provide for the flexible approach that was so greatly expected.

In any event, Storey developed a new interesting interpretive scheme. He considered that the QD could constitute a good departure point for elaborating a universal definition of persecution but he believed that the QD definition was in need of some refinements, in order to make it a global model. According to him, not all aspects of persecution should be translated into human rights terms. He considered that the QD should be better anchored to the overall system of international public law and, for this purpose, he proposed that a larger spectrum of international norms be referred to. For instance, when harms arise in times of conflict, he argued that International Humanitarian Law (IHL) norms should apply instead of human rights. Similarly, when the notion of nationality is involved in the assessment of persecution, rules of nationality law might be needed. According to him, the model of the QD allows for such a large interpretation. To summarise his proposal, he stated that persecution should be understood as the ‘severe violations of international law norms, in particular international human rights norms’. He further endorsed the threshold of harm required under the QD.⁵⁵ Storey then detailed the modalities of persecution relating to the temporal, material and personal scope of the harm.⁵⁶

⁵⁴ Storey *ibid* 471.

⁵⁵ Storey *ibid* 517.

⁵⁶ Storey *ibid* 517-518.

Storey advocated a wider approach for interpreting the notion of persecution that appears more protective of refugees than the approach proposed by Hathaway and, to a certain extent, than the approach of the QD. Indeed, he developed a more flexible framework that encompasses numerous parameters in order to better assess the personal impact that certain measures can have on an individual's life as he considered that more norms of international law should be taken into consideration. As a result, his position takes into account a greater variety of situations.

However, one criticism that could be made of him is that his narrative refers to a very large array of norms and standards and, therefore, it appears quite ambiguous. He argued that international law norms could be referred to for interpreting persecution but he did not specify the exact nature of legal norms that he proposed to consider. Although he mentioned that nationality law or IHL could be used as benchmarks, he did not further state what other rules would be relevant for interpreting persecution. It is, for instance, unclear from his framework whether regional norms or soft law norms could be used as referential standards. Further to this, the risk of inconsistent and restrictive approaches to a human rights narrative has been exemplified by the recent case law of the CJEU and rightly pointed out by Cantor.⁵⁷ This risk seems even greater if we consider any norm of international law in general. Additionally, the threshold that Storey proposes to assess the level of harm, namely 'severe violations of international law norms' remains rather imprecise as argued above in the case of the QD regarding severe violations of basic human rights.

Finally, it should be pointed out that Storey specified that the individual circumstances of refugees should be examined for interpreting the notion of persecution.⁵⁸ Whilst this proposal would permit the balancing of different aspects of refugees' protection needs, Storey did not clearly explain how he would combine these different tests. As such, the definition that he proposed seemed to put greater emphasis on formal norms than on the

⁵⁷ Cantor (n 18) 386.

⁵⁸ Storey (n 1) 495.

practical protection needs of refugees, which could then, lead to a certain confusion. This, therefore suggests that a different focus might be needed to assess persecution.

Part 2) Departing from a human rights narrative: alternative approaches for interpreting the notion of persecution

The foregoing demonstrated that interpretive frameworks, exclusively relying on human rights and international norms, entail the risk of developing a rigid and restrictive methodology. Some authors have proposed alternative approaches that depart from a human rights and positivist narrative of refugee law and consider other concepts as pivotal for interpreting persecution, such as the concepts of identity, dignity and personhood (A) or the concept of discrimination (B). Whilst their proposals have gained less traction in the scholarship than the framework developed by Hathaway, they provide valuable insights on different aspects of the notion of persecution. In addition to the proposals of other scholars, the UNHCR has developed its own approach, which relies on the individual circumstances of refugees as a departure point for assessing what forms of harm amount to persecution (C). These various models will be analysed in turn to argue that UNHCR's model appears the most comprehensive and protective of the situation of refugees.

A) Persecution, identity, dignity and the concept of personhood

Firth and Mauthe⁵⁹ developed a singular narrative that strays away from the formalist human rights framework and proposes to take into consideration a more subjective aspect of the concept of persecution. They suggested to rely on the notion of 'personhood' for determining what forms of harm amount to persecution. In order to do so, they considered how this concept has developed in various legal areas and how the jurisprudence has determined what makes a person a person. In particular, the authors quoted

⁵⁹ Georgina Firth and Barbara Mauthe, 'Refugee Law, Gender and the Concept of Personhood' [2013] 25 International Journal of Refugee Law 470.

the case of the Delhi High Court, *Naz Foundation v Delhi and Others*⁶⁰ that provided some guidance on how ‘personhood’ should be assessed. In this case, the court stated that ‘the holder of rights is (not) an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self, rather people live in their bodies, their communities, their cultures, their places and their times’. In light of this formulation, the authors concluded that the personhood of an individual is shaped by various social, economic, psychological and cultural factors and that these factors, should be taken into consideration for interpreting the notion of persecution.⁶¹ This assessment also includes the subjective perception that individuals have of their own identity.⁶² Their view echoes the position of Slater who highlighted the major role of the concepts of human dignity and subjectivity in order to understand what persecution is. For her ‘human dignity grounds respect individual autonomy and justified claims to basic needs required to have a life of one’s own’.⁶³ Both concepts stress the value of personal agency and presuppose the ‘individual as autonomous and, therefore, entitled to respect for this autonomy’.⁶⁴

Firth and Mauthe believed that the notion of personhood is particularly adapted to women as it encourages ‘decision makers to consider a more complex construction of the realities of refugee women’s myriad experiences’.⁶⁵ Their view aligned with those of numerous authors who have pointed to the sheer complexity of women’s activities that are not reflected in current international human rights paradigm based on typical males’ experiences⁶⁶ but that nonetheless need to be taken into account. The concept of ‘personhood’ highlights the personal dimension of persecution and

⁶⁰ *Naz Foundation v Delhi and Others* [2009] 4 LRC 838 at [47] quoted in *ibid* 490.

⁶¹ They argued that the concept of personhood can be based on the notion of ‘autonomy which enables an individual to attain fulfilment, grow in self-esteem, build relationships’ and ‘fulfil legitimate goals’ in *ibid* 490.

⁶² *Ibid* 498-499.

⁶³ Rachel Helen Slater, *A jurisprudential analysis of the interpretation of ‘persecution’ under the 1951 convention relating to the status of refugees at the domestic level* (Birmingham Law School 2014) 110.

⁶⁴ Slater *ibid* 116.

⁶⁵ Firth and Mauthe (n 59) 473.

⁶⁶ Charlotte Bunch, ‘Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights’ [1990] 12 *Human Rights Quarterly* 486; Celine Romany, ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ [1993] 6 *Harvard Human Rights Journal* 87; Edwards Alice, *Violence against women under international human rights law*, (CUP 2010) 305.

encourages a consideration of various aspects of an individual's identity without mainstreaming people's profiles. However, as noted by the authors themselves, this concept can also appear quite vague and overly subjective as it might 'depend on the view that an individual has on their self, rather than the view of another'.⁶⁷ The authors argued that this pitfall could be overcome by using specific criteria for determining personhood but they simply referred to the different approaches developed in the jurisprudence and did not propose any tangible criteria for defining what constitutes personhood.

Whilst the concept of personhood appears valuable for reasserting the inherent subjectivity and complexity of individuals' experiences, as well as evaluating how identity can shape the protection needs of refugees, it remains a rather general concept. Indeed, as admitted by the authors, it can have very different meanings⁶⁸ depending on the context. In particular, the subjective element of personhood, i.e. how individuals perceive themselves, raises difficulties in evaluating the notion of persecution. As such, Firth and Mauthe's proposal does not solve the concerns raised by authors, such as Valluy and Bellorgey, regarding the inherent vagueness and subjectivity of the refugee definition.⁶⁹ These authors regretted the fact that the formulation of the 1951 Convention generally allows for very subjective interpretations and it seems that unfortunately, the notion of personhood reinforces this caveat.

Although the concept of personhood adequately emphasises the need to examine various circumstances of refugees, including some subjective elements, it seems to be quite difficult to apply in practice. Even if this approach adopts a more circumstantial paradigm in contrast with the human rights approach, it does not constitute a practical model and raises risks of inconsistent interpretation. As such, it has gained very little influence in the literature or in the jurisprudence. More detailed and principled frameworks,

⁶⁷ Firth and Mauthe (n 59) 499.

⁶⁸ Ibid 488.

⁶⁹ Jerome Valluy, 'La Fiction Juridique de l'Asile' [2004] 4 *Plein droit* 17; Jean-Michel Belorgey, 'L'Asile et l'Intime Conviction du Juge' 1 *Plein droit* 59.

also based on the analysis of the personal circumstances of refugees, need therefore to be further considered.

B) Persecution and the core concept of discrimination

Some commentators have proposed a teleological interpretation of the notion of persecution that strays away from Hathaway's narrative. They have suggested to rely on the notion of discrimination in defining a refugee rather than focusing on human rights standards. According to these authors, the reason for perpetrating a harmful act is the keystone for understanding persecution. In their view, persecution is primarily an action aimed at the suppression of a difference.⁷⁰ As such, they considered that the 'unjustifiable and unacceptable'⁷¹ character of persecution is a major component of the notion. However, there has been some debate as to the scope of this narrative. Whilst some commentators have argued that, for a harmful act to amount to persecution, it should primarily be based on at least one of the five grounds enshrined in the 1951 Convention, others considered that this aspect of persecution was too restrictive, and instead contended that the broader notion of discrimination is sufficient to underpin the interpretation of persecution.

i- Persecution as an act based on the five Convention grounds: the pivotal role of the Convention nexus in defining persecution

One of the main authors who advocated a teleological interpretation of the notion of persecution is Steinbock. He considered that understanding the 'core purpose of the refugee definition'⁷² is a major condition for interpreting persecution. For him, this core purpose is the 'protection against the persecution of difference'.⁷³ Whilst differences can be varied, Steinbock contended that the Convention has specifically delineated the contours of

⁷⁰ Jean-Francois Durieux, 'Three asylum Paradigms' [2013] 20 International Journal on Minority and Group Rights 147, 157; Daniel J. Steinbock, 'Interpreting the Refugee Definition' [1998] 45 UCLA Law Review 733, 804.

⁷¹ Alexander Aleinikoff, 'The Meaning of "Persecution" in United States Asylum Law' [1991] 3 International Journal of Refugee Law 5, 12.

⁷² Steinbock (n 70) 804.

⁷³ Ibid 804.

what could amount to persecution by fleshing out five grounds, which he believed should constitute an inherent and pivotal element of the notion. Steinbock elaborated this view in opposition to the human rights narrative. According to him, not only does this narrative omit to feature the five elements as inherent aspect of persecution, but it provides too wide a catalogue of possible harms, which he believes is not what the plenipotentiaries had in mind.

Steinbock, therefore, considered that only certain forms of infringement of peremptory norms, based on Convention reasons, should be considered persecution. For him, ‘the plain meaning of the term “persecution” in the refugee definition, read in light of its history, makes clear that persecution does not exist apart from a prohibited reason for the suffering that it produces’.⁷⁴ This view has traditionally been adopted in US jurisprudence as pointed out by Aleinikoff.⁷⁵ It seemed to have been also endorsed by the QD in its definition of acts of persecution.⁷⁶ It has also been shared, to a certain extent, by Price, who considered that persecution is a harmful act that should be based on ‘illegitimate reasons’,⁷⁷ which he believed should be defined by the five Convention grounds entailed in the refugee definition. He added an exception, as he considered that for certain egregious forms of harm, the Convention reasons should not be considered an essential element of the notion of persecution, given the gravity of such predicaments.⁷⁸ However, for the residual harms, Price maintains that the five Convention grounds are a major component of persecution.⁷⁹

To consider the Convention grounds crucial elements of the notion of persecution appears, however, problematic for several reasons. It might lead to restrictive interpretations of the Refugee Convention by suggesting that

⁷⁴ Ibid 757.

⁷⁵ Aleinikoff (n 71).

⁷⁶ Qualification Directive, Art 9(3).

⁷⁷ Matthew Price, *Rethinking asylum: history, purpose and limits* (CUP 2009) 107: for Price, persecution is cumulatively composed of (1) serious harm that is (2) inflicted or tolerated by official agents (3) for illegitimate reasons.

⁷⁸ Ibid 110: Price argues for an anti-brutality norm.

⁷⁹ Ibid 108: For instance, Price stated that shock therapy perpetrated on mentally ill individuals might not amount to persecution, whilst it could well be considered persecution if it was meant to constitute a treatment of homosexuals.

there should be a persecutory intent behind the act itself. From a formal point of view, this approach seems to ignore the plain text of the refugee definition, which states that a refugee is someone who has a ‘well-founded fear of being persecuted’ for one of the five Convention reasons. As such, tying the Convention reasons to the persecution limb of the definition somehow disregards the ‘well-founded fear’ aspect of the definition. There is indeed nothing to suggest in the 1951 Convention that the five Convention grounds should only be related to the persecution element. Additionally, adopting this view could heighten the burden of proof on claimants. It could be more difficult to demonstrate that a specific harm is based on a Convention ground, than to demonstrate that the overall fear of being persecuted is linked to at least one of these grounds. Whilst an act of persecution in itself might not be motivated by a Convention reason, the risk of harm might be. For instance, consider the case of domestic violence where a woman faced severe harm at the hands of her husband based on purely personal reasons. The harm inflicted upon her is not based on a Convention reason. However, it could be argued that she might not be able to seek protection from the state authorities given the rampant discrimination existing against women in her country. As such, it is the lack of state protection that is based on a Convention reason. Whilst authors have argued that the lack of state protection is directly tied to the notion of persecution,⁸⁰ as previously noted, this view remains contentious. It could also be considered that the lack of protection is in fact linked to the overall ‘well-founded fear of being persecuted’ test as it contributes significantly to the existence of a risk.⁸¹ As such, the existence of the Convention grounds might be, in the above case, linked to the well-founded fear of part of the definition, rather than the persecution element. Regardless of the position adopted, it would be less circuitous to argue that the Convention nexus constitutes an additional test, linked to the ‘well-founded fear of being persecuted’ formulation as a whole, referring either to persecution or to the well-founded fear, depending on the case.

⁸⁰ See Chapter 2, Part 3.

⁸¹ See for instance, Goodwin-Gill Guy and Jane McAdam, *The Refugee in International Law*, (3rd edn, OUP 2011) 100: Goodwin-Gill and McAdam argued that the absence of state protection might well be considered to contribute to the existence of a risk, rather than defining per se the nature of persecution. For them, the correlation between state protection and persecution is ‘coincidental’ not normative.

This view has in fact been shared by numerous authors. For instance, Foster considered that the Convention grounds need to be one contributing factor to the overall sentence ‘well-founded fear of being persecuted’.⁸² Similarly, Hathaway stated that the Convention reasons should constitute a factor ‘in creating the risk of being persecuted’.⁸³ As such, neither of them confined the Convention nexus to the notion of persecution, but linked it to the overall existence of a risk of persecution. On a similar note, Aleinikoff argued that persecution should not be tied to the Convention grounds but should be given a ‘free-standing meaning’.⁸⁴ In light of these different views, an interpretive scheme that relies on the Convention nexus as a pivotal element of persecution can unduly heighten the burden of proof on claimants and, as such, appears quite restrictive. This approach, while developing an alternative model to the formalist human rights framework, does not seem able to sufficiently encompass the various types of predicament faced by refugees.

ii- Discrimination vs persecution?

Other authors also considered that the reasons for harm are major elements of the persecution definition but they departed from the Convention grounds approach and contended that persecution should be based on the broader principle of non-discrimination. For instance, for Aleinikoff, persecution should be based on a large variety of unjustifiable reasons, not confined to the five reasons of the Convention,⁸⁵ thus highlighting the necessity of a broader discriminatory treatment. On a similar note, Bagaric and Dimopoulos argued that the notion of discrimination was the ‘touchstone’⁸⁶ of persecution. Schoenholtz also considered that the purpose

⁸² Michelle Foster, ‘Causation in Context: Interpreting the Nexus Clause in the Refugee Convention’ [2002] 23 Michigan Journal of International Law 265, 340.

⁸³ James Hathaway and Michelle Foster, *The Law of Refugee Status*, (2nd edn; CUP 2014) 390.

⁸⁴ Aleinikoff (n 71) 13.

⁸⁵ Ibid 12.

⁸⁶ Bagaric and Dimopoulos considered that the concept of discrimination was the touchstone of persecution in cases of harm arising from law of general application in Mirko Bagaric and Penny Dimopoulos, ‘Discrimination as the Touchstone of Persecution in Refugee Law’ [2007] 3 Journal of Migration and Refugee Issues 14.

of the 1951 Convention is to provide protection against ‘persecutory discrimination’.⁸⁷ Durieux contended the same and stated that acts of persecution are considered unjustifiable because they negate diversity in a society and punish individuals for their differences. Durieux uses, as a departure point, the definition of the US Court of Appeal of the 9th Circuit stating that persecution is a form of ‘oppression which is inflicted on groups of individuals because of a difference that the persecutor will not tolerate’.⁸⁸ In line with this definition, he noted that persecution has a discriminatory character. As per the predominant view,⁸⁹ he does not believe that a mere discrimination amounts to persecution. He argued, instead, that a certain threshold is necessary to assess the level of harm required under the refugee definition and proposed that the notion of ‘violence’ be also considered a pivotal element in defining persecution.⁹⁰ In his own words, persecution is a ‘violent form of discrimination’. It ‘supposes the use of coercion towards the suppression of difference’.⁹¹ His model, based on the notion of discrimination, encourages a broad assessment of various harmful measures and, as such, departs from a strict basic human rights narrative. It is also not limited to the five Convention grounds and postulates that numerous discriminatory reasons can underlie an act of persecution. Similarly, Dowd highlighted the broad character of the notion of discrimination. She stated that it can refer both to various forms of serious harm and to human rights violations,⁹² and, therefore, encompasses a potentially larger variety of predicaments.

Whilst this narrative permits the development of a seemingly wider analysis of the kinds of harm that amount to persecution, it remains, however, quite vague. Indeed, Dowd pointed to the general character of the notion of ‘discrimination’ and stated that it has been ‘rarely discussed as a concept in

⁸⁷ Andrew I. Schoenholtz, ‘The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century’ [2015] 16 *Chicago Journal of International Law* 81, 124.

⁸⁸ *Adela Hernandez-Ortiz v. Immigration and Naturalization Service*, United States Court of Appeals, Ninth Circuit 777 F.2d 509, decided 2 December 1985 at [20] quoted in Durieux (n 70) 157.

⁸⁹ UNHCR Handbook, at [54].

⁹⁰ Durieux (n 70) 157.

⁹¹ *Ibid* 157.

⁹² Rebecca Dowd, ‘Dissecting Discrimination in Refugee Law: an Analysis of its Meaning and its Cumulative Effect’ [2011] 23 *International Journal of Refugee Law* 28, 39.

itself in refugee law'.⁹³ In fact, she considered that the concept of discrimination is often used as a 'catch-all' term⁹⁴ to deny refugee claims often considered akin to violations of various types of human rights. She demonstrated that, due to this, the notion of discrimination has been interpreted in very inconsistent ways and different standards have been used for different types of claim.⁹⁵ In order to minimise the risk of inconsistent interpretations, Dowd proposed that the notion of discrimination should be understood in a broad manner, so as to analyse a large spectrum of measures and not only violations of human rights. For instance, she contended that the consequential impact that certain types of discrimination have on individuals - including the adverse psychological harm that they can cause - should be assessed through a holistic analysis.⁹⁶ According to her, the 'purpose of undertaking a cumulative analysis should be to consider the overall impact of discrimination on an individual's life, not merely its impact on a limited selection of narrowly-defined rights'.⁹⁷ As such, she stated that the circumstances and conditions of individuals need to be taken as a departure point to assess how discriminations affect a person's life.⁹⁸

In contrast to the views of the above authors, it could be said that the concept of discriminatory harm does not always reflect the reality behind certain forms of violence based on personal consideration, such as, for instance, domestic violence. As previously argued, the discriminatory intent can, in some contexts, be imputable to the state rather than the agent of harm when non-state agents of persecution are involved. According to the HRC, an act of discrimination implies 'any distinction, exclusion, restriction of preference which is based on any ground [...] and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.⁹⁹ In this context, the intention to discriminate is not needed, as long as the act has the 'effect'

⁹³ Ibid 32.

⁹⁴ Ibid 35.

⁹⁵ Ibid 46.

⁹⁶ Ibid 51.

⁹⁷ Ibid 53.

⁹⁸ Ibid 49.

⁹⁹ Human Rights Committee, General Comment, No. 18: non-Discrimination (1989) at [7].

of discriminating. It might well be argued that acts of domestic violence, although more directly based on personal reasons, might have the effect of perpetuating discrimination against women in certain contexts. As such, there would be an underlying discriminatory element to the infliction of harm. Whilst this is not disputed here, proving this element might be more difficult than proving the discriminatory element underlying the lack or failure of state protection. As such, depending on the context, it remains that considering the notion of discrimination as an inherent part of the persecution test could add an extra burden of proof on certain claimants, in particular in cases of gender-based violence. It remains, nonetheless, a relevant notion to be considered in certain cases of persecution.

In order to understand how the notion of discrimination can be factored into the concept of persecution, reference to Price could be helpful. Indeed, Price interestingly developed the idea of a sliding scale for considering the reasons behind the harm perpetrated. According to him, for grave acts (defined through references to customary law), there is no need to consider the reasons behind those acts, whilst for milder forms of harm, the five Convention grounds become fundamental to the notion of persecution. Although his test seems quite severe because Price considered that only the violations of peremptory norms¹⁰⁰ would remove the need for a Convention ground, his logic brings some insight as to how the degree of persecution is to be articulated with its qualitative aspect. His sliding scale could suggest that various restrictions, when compounded by an element of discrimination (which should not necessarily be restricted to the Convention Reasons) could amount to persecution, whilst other forms of egregious harm could be considered unjustifiable and unacceptable by nature, regardless of the reasons behind the act. In the words of the Canadian Federal Court of Appeal, for certain acts it can be considered that ‘brutality in furtherance of a legitimate end is still brutality.’¹⁰¹ This combination of qualitative and quantitative

¹⁰⁰ The nature of such norms is generally debated, which undermines the accuracy of Price’s proposed narrative. For example, refer to the: debate on whether rape is considered *Ius Cogens*. On this see: David S. Mitchell, ‘The Prohibition of Rape in International Humanitarian Law as a Norm of *Ius Cogens*: Clarifying the Doctrine’ [2005]15 *Duke Journal of Comparative & International Law* 219.

¹⁰¹ *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, Canada: Federal Court of Appeal.

factors appears indeed relevant to assess the notion of persecution. For more severe acts of violence, for instance domestic violence, no discriminatory intent is needed whilst for milder forms of harm, a discriminatory element might be needed so that the harm qualifies as persecution. In any case, it remains that the Convention grounds have to be attached to the overall formula of a ‘well-founded fear of being persecuted’.

In spite of its intrinsic limitations, the above narrative has the advantage of putting a greater focus on the effects of persecution on individuals, in contrast to the various human rights frameworks, that somehow obviate this element by focusing on the formal existence of human rights violations.¹⁰² It demonstrates that both the qualitative and quantitative aspects need to be factored into the assessment of what persecution is, depending on the degree of the harm. This view in turn encourages a more flexible and all-encompassing analysis of the different circumstances of refugees.

In this sense, the UNHCR has proposed a more comprehensive analysis of persecution, factoring in these various elements, including the five Convention grounds, as well as broader qualitative and quantitative criteria, compounded with subjective aspects of the notion of persecution. The UNHCR’s view on persecution will be assessed below.

C) The UNHCR’s model for interpreting persecution

i- The human rights and circumstantial approaches

Before Hathaway formulated his human rights framework, the UNHCR published a Handbook¹⁰³ in 1979, whereby it proposed a two-tier test for interpreting the notion of persecution. Although the UNHCR’s

¹⁰² The QD touches upon this qualitative aspect by saying that some acts are by ‘nature’ sufficiently serious. However, it does not say much about the nature of the harm as it says that it should amount to a ‘severe violations of basic human rights’, which in turn constitutes a vague threshold as argued above.

¹⁰³ UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV.3.

interpretive approach seemed to have gained less influence in the scholarship and in national jurisdictions than the model developed by Hathaway,¹⁰⁴ it nonetheless provides some relevant insights as to how persecution should be interpreted.

Firstly, the UNHCR Handbook stated that serious human rights violations could amount to persecution when based on a Convention ground. Indeed, the Refugee Agency stated that ‘a threat to life or freedom on account of [a Convention ground] is always persecution. Other serious violations of human rights [...] would also constitute persecution’. In this first test, the UNHCR firmly relied on international human rights as benchmarks for interpreting the notion of persecution. This is in line with the official UNHCR’s position that the 1951 Convention has a human rights orientation¹⁰⁵ and, as such, human rights should not be ignored when interpreting persecution. This specific test is, however, quite limited because it posits that, to amount to persecution, human rights violations should necessarily be tied to a Convention reason. This therefore restricts the possibilities of interpretation as mentioned above. However, according to the refugee agency, persecution ‘should not be defined solely on the basis of serious human rights violations’.¹⁰⁶ In order to balance out this rather formalist approach, the UNHCR considered that if this test fails, an expanded framework should be applied. This second test takes the individual

¹⁰⁴ In particular in common law jurisdictions; chapter 4 will assess the influence of the human rights approach in national jurisdictions.

¹⁰⁵ Paragraph 25 of the UNHCR Handbook [...] *The High Commissioner has always pleaded for a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the declaration on Territorial asylum, adopted by the General Assembly of the United Nations on 10 December 1948 and on 14 December 1967 respectively, see also UNHCR ExCom Conclusion No 50 (XXXIX) ‘General Conclusion on International Protection’ (1988): The Executive Committee [...] (b) Noted the direct relationship between the observance of human rights standards, refugee movements and problems of protection; UNHCR ExCom Conclusion No 103 (LVI) ‘The Provision of International Protection including through Complementary Forms of Protection’ (2005): The Executive Committee (c) Recognizes that refugee law is a dynamic body of law based on the obligations of State Parties to the 1951 Convention and its 1967 Protocol and, where applicable, on regional refugee protection instruments, and which is informed by the object and purpose of these instruments and by developments in related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection; UNHCR, ‘Note on The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’, [2001] 20 Refugee Survey Quarterly 77, 78.*

¹⁰⁶ Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, SCIFA (Brussels, 6 November 2002), DIP Statements, Geneva, published on UNHCR website <http://www.unhcr.org/42bab1b52.html>; See also Storey (n 1) 278. According to Storey, UNHCR considers that there ‘is a residual content to persecution uncaptured by the human rights approach’.

circumstances of refugees as a departure point to assess the various forms of harm that one can face. Storey called it the ‘circumstantial approach’.¹⁰⁷

The UNHCR Handbook affirmed as follows:

52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on ‘cumulative grounds’. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

In this definition, the UNHCR factors in numerous aspects of the notion of persecution. Firstly, this test requires a consideration of the

¹⁰⁷ Storey (n 1) 465.

particular situation and vulnerabilities of refugees in order to assess the consequential impact that various measures have on individuals. The UNHCR then highlights the importance of a subjective element in assessing what forms of harm amount to persecution by stating that an ‘evaluation of the opinions and feelings of the person concerned’¹⁰⁸ should be conducted. As a result, the persecutory nature of an act will depend on the personal background and conditions of the person claiming asylum and, therefore, the assessment of harm could fluctuate. The UNHCR indeed acknowledged that whether a certain form of harm amounts to persecution ‘will depend on the circumstances of each case’.¹⁰⁹ The Refugee Agency justified this position by stating that, ‘due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary’.¹¹⁰ The UNHCR Handbook added an additional paragraph in which it stated that various other measures can, based on cumulative grounds, also amount to persecution.¹¹¹ Overall, the Refugee Agency encourages the adoption of a holistic approach but does not specify the level of harm required for an accumulation of measures to amount to persecution. This omission appears deliberate as the Handbook stated that ‘it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances’.¹¹²

Indeed, according to the UNHCR, all forms of predicament, as a whole, and their consequences on individuals’ life should be analysed in order to assess persecution. The UNHCR gave more guidance in another document on the threshold of harm required, by stating that threatening conditions ‘mak(ing) life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin’¹¹³ constitute persecution.

¹⁰⁸ UNHCR Handbook (n 103) at [52].

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid at [53].

¹¹² Ibid at [53].

¹¹³ Feller (n 106).

Interestingly, in the circumstantial approach, the UNHCR did not explicitly correlate the notion of persecution with the Convention nexus, thus seemingly adopting a broader view of what sorts of harm could amount to persecution. The view that the Convention grounds are not always linked to the notion of persecution is repeated in a number of UNHCR guidelines.¹¹⁴ In particular, when the perpetrator of persecution is a non-state agent, the UNHCR connects the convention nexus to the lack of state protection¹¹⁵ without necessarily linking the absence of state protection to the notion of persecution. For instance, the UNHCR specifically stated that there are situations ‘where the risk of being persecuted at the hands of a non-state actor is unrelated to a Convention ground’.¹¹⁶ Therefore, for assessing the Convention nexus, the UNHCR seems to establish a separate test that might either relate to the well-founded fear of harm or to the notion of persecution, depending on the circumstances at hand. In light of the foregoing, it appears that the circumstantial approach is broader than the human rights approach that is proposed in paragraph 51 of the Handbook.

ii- A framework leading to inconsistent interpretations?

Whilst the UNHCR’s framework encourages a holistic analysis of the notion of persecution, its subjective dimension may raise concern as pointed out by some authors. The subjective element proposed by the UNHCR conflicts with the view of Tobin who believed that the purpose of the interpretive exercise is to maintain some level of coherence within different fields of law. He stated that the ‘resolution of any ambiguity within the Refugee Convention should be informed by, among other things, an attempt to achieve coherence or harmonisation with the provisions of international human rights treaties’.¹¹⁷ Therefore, he considered that for interpreting

¹¹⁴ UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, 31 March 2010; UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No.2: ‘Membership of a Particular Social Group Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’, 7 May 2002, HCR/GIP/02/02.

¹¹⁵ Ibid at [23].

¹¹⁶ Ibid.

¹¹⁷ John Tobin, ‘Assessing LGBTI Refugee Claims: Using Human Rights to Shift the Narrative of Persecution Within Refugee Law’ [2012] 44 New York University Journal of International Law and Politics 448, 455.

persecution, a more didactic approach should be adopted by giving primary consideration to human rights standards and the way they should be applied in refugee law in accordance with other legal areas. For him, it would be a ‘mistake to selectively import aspects of human rights discourse into refugee law in ways that were not consistent with the entire system of international human rights law’.¹¹⁸ This view strays away from the UNHCR’s approach that rather emphasises the importance of the personal circumstances of refugees to assess the level of harm in combination with human rights norms, only when deemed relevant. As such, the UNHCR does not seek to reinstate the interpretation of the notion of persecution into the broader field of international human rights law or to achieve coherence between refugee law and human rights law.

The UNHCR’s methodology was also criticised by Storey who considered that it was not sufficiently principled.¹¹⁹ He believed indeed that it ‘encourages subjective decision making and [...] divergent jurisprudence’.¹²⁰ Storey highlighted that UNHCR’s subjective element is mostly contingent upon persons with different characters and thus, the interpretation of persecution might vary greatly depending on individuals. He contended that this component could encourage unfair decisions for people who do not display significant distress or who simply do not reasonably anticipate the danger that they might be at risk of facing upon return to their country. He believes that this is contrary to the universal character of the 1951 Convention. On this point, he stated that ‘if Article 1A(2) is to have universal application then it cannot impose a requirement that certain deserving subcategories of persons would often be unable to meet, most notably very young children or disabled people who may not even be aware that they are on a persecutor’s death list’.¹²¹ Storey concluded that objective standards are needed to interpret the notion of persecution in all circumstances¹²² and, by departing from the human rights approach, he contended that the UNHCR

¹¹⁸ Ibid, 455.

¹¹⁹ Storey (n 1) 468.

¹²⁰ Ibid 468.

¹²¹ Ibid 509.

¹²² Ibid 467.

does not adopt an appropriate framework. His view echoes the one held by Hicks and Hathaway who considered that the subjective fear paradigm adopted in the UNHCR Handbook is equivocal and encourages divergent approaches.¹²³ They called it a ‘trepidation’¹²⁴ element, that they believe should not be factored into the refugee definition.

Following the contention made by Storey and others, it cannot be denied that the circumstantial approach encourages a case-by-case analysis that can cause inconsistent interpretations of the notion of persecution. However, Storey seemed to place too much emphasis on the role of subjective fear in interpreting the notion of persecution. Firstly, it should be noted that the UNHCR mostly referred to this element in order to assess the ‘well-founded fear’ limb of the refugee definition, which is distinct from the persecution enquiry.¹²⁵ As such, the importance of subjective fear in the persecution test itself should be relativised. The view that subjective fear is mostly relevant to the well-founded fear part of the definition has been clearly expressed by Hicks and Hathaway.¹²⁶ Similarly, Chimni acknowledged that the UNHCR Handbook posited the existence of a ‘subjective test’ for assessing the well-founded character of a claim, but he omitted to mention this in his section on persecution, thus suggesting that its role was quite minimal for assessing persecution.¹²⁷ Whilst it is true that both tests (well-founded fear and persecution) are closely related, they should, nonetheless, be distinguished for conceptual clarity. The well-founded fear element generally requires an assessment of the likelihood that a certain harm will happen, whilst the test of persecution requires an assessment of the nature and degree of the harm.

¹²³ James C. Hathaway and William S. Hicks, ‘Is there a Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear”?’ [2005] 26 Michigan Journal of International Law 505, 507.

¹²⁴ Ibid 506-507.

¹²⁵ The UNHCR Handbook, paragraphs 35 to 50 deal with the ‘well-founded fear’ element whilst paragraphs 51 to 53 deal with the ‘persecution’ analysis.

¹²⁶ Hathaway and Hicks (n 123) contended that the subjective element should not have a major bearing in interpreting the refugee definition but in their article, they mostly referred to the ‘well-founded fear’ part of the definition.

¹²⁷ B. S. Chimni, *International refugee Law: a Reader* (2nd edn, Sage Publication 2002) 3.

It should be acknowledged that the notion of subjective fear is also mentioned in the section on persecution¹²⁸ in the UNHCR Handbook. Its importance is, however, minimised as the Handbook considers that subjective fear (or the frame of mind of an applicant) is relevant only when ‘supported by an objective situation’.¹²⁹ Whilst the UNHCR relativised the scope of this element, the exact role that it should play when assessing persecution is unclear. To clarify that point, reference should be made to the overall wording of the UNHCR Handbook which suggests that subjective fear should not be used to deny refugee status. In this sense, Juss considered that this concept, together with other paradigms, in fact ‘adds to and embellishes’¹³⁰ the 1951 Convention, thus indicating that it should be interpreted in a manner that is sufficiently in line with the protective purpose of the Convention.

The subjective fear test should be indeed considered relevant for refugees who have certain vulnerabilities so that these fragilities can be taken into account in order to better assess the impact that certain measures can have on the individuals seeking asylum. For instance, some restrictions (such as temporary detention) might have more adverse consequences on someone who has already suffered trauma, than on an able-bodied person without major psychological issues. In this sense, the subjective element of persecution appears relevant to individualise the analysis of the notion of persecution. This view is further confirmed in paragraph 40 whereby the UNHCR stated that the ‘psychological reaction’ of individuals is a relevant element to take into consideration when applying the refugee definition. It should, however, not be applied too systematically. Paragraph 52 of the UNHCR Handbook emphasises this point by stating that whether ‘prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, *including* the subjective element’. The insertion of the word ‘including’ is significant in that it confers a minimal importance to the subjective fear and confines it to the analysis of persecution only in

¹²⁸ The UNHCR Handbook (n 103) at [52].

¹²⁹ Ibid: paragraph 52 refers to paragraph 38 whereby the assessment of the ‘objective situation’ is also required in order to assess whether a fear is well-founded.

¹³⁰ Satvinder Juss, ‘The UNHCR Handbook and the Interface Between ‘Soft law’ and ‘Hard Law’ in International Refugee Law’ in Satvinder Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham 2013) 31-67, 43.

certain cases where the psychological element is of relevance. It does not require that all claimants show signs of trepidation to the thought of returning to their country. Consequently, the examination of subjective fear is not posited as a pivotal condition for interpreting persecution in all cases and its importance should not be overstated. The contention that the subjective fear component encourages subjective and divergent jurisprudence appears therefore a bit excessive because this should not be the case, if this notion is appropriately applied in the assessment of persecution.

iii- Practical benefits of the circumstantial approach

Unlike what the above authors have argued, the UNHCR's approach presents positive insights for interpreting persecution. Firstly, it has the advantage of highlighting the personal and psychological aspects of persecution in that it proposes to assess the level of suffering one can experience regardless of whether external human rights have been violated or not. Human rights law is premised on the assumption that all individuals have the same protection needs and conform to one model of 'personhood'. Whilst the standards developed by human rights might be suitable for a large number of individuals, they might inadequately dictate what types of treatment are bearable or unbearable for others. Evaluating the protection needs of individuals necessarily demands that the personal circumstances and psychological make-up of persons be taken into consideration. In contrast, human rights law tends to isolate elements of harm in light of abstract standards and thus, does not encourage an assessment of cumulated circumstances. Whilst it is true that the approach proposed by the UNHCR requires a case-by-case analysis, an objective line of argumentation is nonetheless proposed, that minimises the risk of inconsistent interpretations. Indeed, in encouraging an assessment of the circumstances of refugees, the UNHCR proposes to rely on concrete elements that constitute these circumstances, namely the claimants' profile, vulnerability, past experiences of harm etc. These factors remain rather objective and provide solid indicators of the level of harm faced by a refugee. Factoring these elements into the assessment of what amounts to persecution would in turn encourage a more

transparent assessment of the consequences that certain measures can have on someone's life.

As such, whilst the UNHCR maintains that human rights are important references for interpreting the notion of persecution, they only represent 'one touchstone for determining the existence of persecution'.¹³¹ Supporting this view, McAdam considered that human rights are important standards 'in assessing whether persecution may exist in a given situation' but, for her, 'the additional subjective element of the Convention definition captures a need for protection that is outside the realm of a pure human rights assessment, and cautions against tying the concept of persecution exclusively to human rights law'.¹³² Edwards also believed that human rights law does not reflect the different needs of individuals, and although she believed that it 'contributes in some cases to a clearer identification of particular forms of persecution', she considered that 'the 1951 Convention does not require that a human rights violation be acknowledged in order to establish "persecution"'.¹³³ Through the circumstantial approach, the UNHCR proposes in fact to address the personal aspect of persecution and take the individual situation of refugees in its various aspects as a pivotal element in assessing the level of harm that they might be likely to face upon return to their country.

A case from the Court of Appeal in the UK demonstrated the caveat of a rigid approach based on formalist standards of human rights protection vs a more circumstantial approach such as the one proposed by the UNHCR. In *AI (Nigeria) v. Secretary of State for the Home Department*,¹³⁴ the Court of Appeal denied the asylum claim of a Nigerian woman by considering that the applicant did not have a well-founded fear of being persecuted. The claimant was a single Christian woman, head of a household who used to live in a predominantly Muslim area in Nigeria. She contended that she was at

¹³¹ Cantor (n 18) 385.

¹³² McAdam (n 3) 12-13.

¹³³ Alice Edwards, 'Age and gender dimensions in international refugee law' in Erika Feller, Volker Turk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 80.

¹³⁴ *AI (Nigeria) v. Secretary of State for the Home Department*, [2007] EWCA Civ 707, 21 June 2007.

risk of facing harm on account of her profile as a lone woman without male protection. She claimed that she had left her home area due to communal violence against Christians. Following this, she lived alone in charge of her child and in order to meet her basic needs, she had to ‘sleep with people’.¹³⁵ Whilst the court accepted that discriminations against women were rampant in Nigeria, and such discriminations had most certainly led the applicant to prostitute herself, it was decided that these predicaments did not amount to persecution. However, the reasoning of the court for reaching this conclusion was quite obscure. The court simply interpreted the notion of persecution against formal standards of gender-based violence and considered the concept of ‘prostitution’ in the abstract by stating that ‘prostitution under the threat of violence’ can amount to persecution, but ‘prostitution per se’ does not.¹³⁶ The deficiency of this approach is that the Court only analysed grave forms of harm similar to the ones recognised in international treaties,¹³⁷ such as the ‘threat of violence’ leading to sexual exploitation. The Court considered this form of harm, separately from its context, to conclude that prostitution itself is not a form of persecution because there is no element of violence involved.

Whilst it might be true that prostitution per se does not amount to persecution, it does not mean that the experiences of the applicant considered in the aggregate will not amount to persecution, as the UNHCR’s approach would suggest. Indeed, a closer analysis of the applicant’s circumstances causing her to prostitute herself would have been useful to reach a more informed decision. The adjudicator could have analysed the harm that the applicant was likely to face against her overall profile as a member of a religious minority (in her home area) who had been displaced without her family due to communal violence and who ended up lacking family and male protection, being a single mother, head of a household who had to prostitute herself to earn her living due to rampant discrimination in her country. As per the UNHCR guidelines on gender-related persecution, ‘if measures of

¹³⁵ Ibid at [7].

¹³⁶ Ibid at [12].

¹³⁷ In this case, the court did not explicitly quote human rights treaties, but it referred to abstract standards developed in international human rights law, and as such followed the same logic as the human rights narrative.

discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or access to available educational facilities',¹³⁸ such measures could amount to persecution. This case shows that the appreciation of refugees as persons with various circumstances and a complex set of experiences offers a better understanding of what could amount to persecution rather than relying on a rigid approach that compartmentalises the assessment of various types of harm.

In light of the above, it appears that the UNHCR approach encourages a comprehensive analysis of the various circumstances of refugees in order to assess how certain measures could amount to persecution. It adopts a more practical approach, as opposed to the formalist frameworks that rely on external benchmarks for assessing persecution.

Part 3) Concluding Remarks

Given the inherent limitations attached to an interpretive framework that only relies on basic human rights for interpreting the notion of persecution, various other models that encourage a more holistic analysis of persecution have been analysed in this chapter. Some models, such as the ones established by the QD, and then by Storey, suggest to expand the basic human rights framework, but still consider external norms of international law as the keystone of persecution. Whilst these frameworks are broader than Hathaway's narrative, they nonetheless adopt a rather rigid methodology by using objective norms as a departure point for interpreting persecution, which bears the risk of obviating some of the personal circumstances of refugees. They encourage an analysis of different human rights violations, taken in the abstract, and disregard other aspects of individuals' vulnerabilities. In addition to this problem, the recent jurisprudence of the CJEU has

¹³⁸ UNHC Guidelines on International Protection No.1: Gender Related Persecution in the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01.

demonstrated that human rights frameworks can be very narrowly and variably interpreted. They also do not necessarily resolve the problem of inconsistent interpretations of the refugee definition.

Given these deficiencies, other models have been considered. These models departed entirely from the basic human rights approach and considered that other elements were pivotal for interpreting persecution. In particular, the concepts of ‘personhood’, ‘Convention nexus’ or ‘discrimination’ were advanced by certain scholars. Through the notion of personhood, Firth and Mauthe shifted the paradigm on the individual aspects of persecution by placing a greater emphasis on the profile and experiences of refugees. This model was, however, considered too vague and too subjective. The narratives based on the ‘Convention nexus’ and ‘discrimination’ rightly pointed to the qualitative aspect of persecution, namely the unjustifiable infliction of harm, but they also raised some conceptual uncertainty as demonstrated in this chapter.

Finally, the UNHCR has attempted to combine various narratives into a two-tier test, based on a human rights approach on the one hand, and on a circumstantial approach on the other hand. Through this framework, the UNHCR stressed the importance of assessing the consequences that certain restrictions have on individuals rather than focusing on the nature and gravity of the restrictions themselves. The strength of this approach is that it encourages decisions makers to better take into consideration the individual circumstances and special vulnerabilities of refugees for interpreting persecution but it also considers that human rights have a role to play in informing an evolutionary understanding of the notion of persecution.

After a theoretical *tour de table* of the different frameworks proposed for interpreting persecution, the following chapter will engage in a more practical assessment of various jurisprudential approaches adopted in countries with developed RSD systems in order to evaluate the concrete influence that these interpretive frameworks have had so far on the case law.

Chapter 4: Interpretation of the notion of persecution in domestic jurisdictions: inconsistent approaches

The previous chapters have analysed various theoretical approaches for interpreting persecution in the refugee definition. One could, however, wonder whether these frameworks have provided useful and concrete tools to national decision makers for applying the terms of the 1951 Convention in a manner that remains relevant to the protection needs of refugees in the 21st century?

In order to assess how these models have been used in practice, the present chapter will analyse the jurisprudential approaches developed at the domestic level. This chapter will focus on some of the countries with the most advanced RSD systems, namely some countries of the European Union that have received a large number of asylum claims in the past decades such as the UK, France and Belgium (Part 1) as well as other common-law countries such as New Zealand, Australia, Canada, and the USA (Part 2). Through a general overview of different case laws, this chapter will demonstrate that the human rights narrative, which has been the most widely used, has not fostered major consistency amongst jurisdictions, nor has it proven to be always adaptable to the evolution of refugee claims. In general, it will be argued that none of the examined countries have applied a consistent framework of interpretation, thus creating some form of legal uncertainty for asylum seekers.

Part 1) The definition of the notion of persecution in Europe: the persistency of divergent approaches

All European countries have acceded to the 1951 Convention and have subsequently adopted their own interpretive approach to the refugee definition. In order to develop a harmonised legislation at the European level,

member states of the Union have elaborated the CEAS, consisting of a series of instruments, including the QD, which laid out common standards for interpreting the refugee definition. This section will assess the different judicial practices in member states before the adoption of the QD (A) and the impact that the human rights-oriented definition of persecution proposed by the QD had on national jurisprudences (B). It will be demonstrated that this impact was minimal and that more consistency amongst countries of the EU is desirable.

**A) Asylum law in Europe before the Qualification Directive:
divergent approaches for interpreting persecution**

Whilst no international definition of persecution existed before the adoption of the QD, the interpretation of the notion of persecution had traditionally been left to the discretion of national judges. As asylum applications diversified in the 1980s and 1990s, asylum judges in European countries started defining their own narratives for interpreting the refugee definition and generally adopted rather inconsistent views. Although, at that time, Hathaway's framework started to gain some influence, in particular in common-law countries like the UK, other countries, generally of a civil-law tradition, tended to rely more on an ad hoc methodology for interpreting persecution.¹ These diverse approaches led to a fragmentary state of the jurisprudence in Europe as pointed out by Arboleda and Hoy who noted that the recognition rates of asylum seekers were very varied in the 1990s. According to them, such disparities were due to the 'lack of shared interpretation and understanding of the definition [of a refugee].'² Although they did not specify which part of the definition raised disagreements, persecution as a pivotal element of the Refugee Convention had clearly been

¹ Dirk Vanheule, 'A Comparison of the Judicial Interpretation of the Notion of Refugee' in Jean-Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge?* (Kluwer Law International 1997); Vanheule demonstrated that the human rights approach has been more often adopted in common law countries, than in civil law countries. See also, Jerome Valluy, 'La Fiction Juridique de l'Asile' [2004] 4 *Plein droit* 17 and Jean-Michel Belorgey, 'L'Asile et l'Intime Conviction du Juge' 1 *Plein droit* 59; Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 30.

² Eduardo Arboleda and Ian Hoy, 'The Convention Refugee Definition in the West: Disharmony of Interpretation and Application' [1993] 5 *International Journal of Refugee Law* 66, 82.

the object of divergent views. This observation was confirmed by Storey who noted that before the adoption of the QD, there were ‘considerable variations’³ in the interpretation of the refugee definition due to the undetermined nature of the notion of persecution. This state of the practice, therefore, created some form of legal uncertainty in the Union. According to North and Chia, this led to unfair applications of the Convention and undermined the principle of justice.⁴

The different approaches for interpreting the notion of persecution in countries like the UK, France and Belgium mirrored the level of inconsistency existing in the Union and, will be therefore analysed in turn.

i- The United Kingdom: a reserved reliance on Hathaway’s framework?

British asylum judges started to adopt a principled approach for interpreting the provisions of the refugee definition in the 1990s. In early cases, the notion of persecution was interpreted with a certain disregard to human rights⁵ but after Hathaway formulated his framework, asylum judges started regularly referring to basic human rights as a guiding scheme for assessing persecution.⁶ Whilst the idea that basic human rights could provide objective benchmarks of interpretation progressively gained influence in the jurisprudence, the modalities of this human rights framework remained, however, inconsistently applied. One of the first cases to adopt Hathaway’s narrative was *Senathirajah Ravichandran v. Secretary of State for the Home*

³ Hugo Storey, ‘Refugee Qualification Directive: A Brave New World?’ [2008] 20 International Journal of Refugee Law 1, 8.

⁴ Anthony North and Joyce Chia, ‘Towards Convergence in the Interpretation of the Refugee Convention: a Proposal for the Establishment of an International Judicial Commission for Refugees’ [2006] 25 Australian Yearbook of International Law 228;⁵ See also on inconsistent approaches in the EU: Raza Husain, ‘International Human Rights and Refugee Law: The United Kingdom’ Bruce Burson and Cantor David James (eds), *Human Rights and the Refugee Definition Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 138-155, 143.

⁵ See also on inconsistent approaches in the EU: Raza Husain, ‘International Human Rights and Refugee Law: The United Kingdom’ Bruce Burson and Cantor David James (eds), *Human Rights and the Refugee Definition Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 138-155, 143.

⁶ See, inter alia, *Senathirajah Ravichandran v. Secretary of State for the Home Department* [1996] Imm AR 97 United Kingdom: EWCA, 11 October 1995; *Horvath v Secretary of State for the Home Department* 1 AC 489 [2000] 3 WLR 379 United Kingdom: House of Lords (Judicial Committee), 6 July 2000; *Sepet v Secretary of State for the Home Department*, UKHL 15 [2003] 1 WLR 856 United Kingdom: House of Lords, 20 March 2003 p.4.

Department,⁷ where the Court of Appeal considered the application of an ethnic Tamil from Sri Lanka who feared arbitrary detention and ill-treatment in his country. In this case, the court upheld the various criteria defined in the basic human rights model⁸, including the criteria of persistency.⁹ Whilst this case faithfully adopted Hathaway's framework, later jurisprudence strayed away from some of its parameters, and in particular from the 'sustained or systemic' test, that was sometimes considered too restrictive.¹⁰ After this, Lambert pointed that, the role of the persistency criteria had remained 'undecided'¹¹ in the British jurisprudence.

In spite of this progressive departure from Hathaway's framework, his view that persecution consisted in basic human rights violations, compounded by the absence of state protection, was generally maintained as an adequate approach. For instance, in the decision *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal, ex parte Shah (Islam and Shah)*,¹² the House of Lords implicitly endorsed Hathaway's definition of persecution as a form of serious harm compounded by a lack of state protection. In particular, Lord Hoffman expressly affirmed that 'the whole purpose of the Convention is to give protection to certain classes of people who have fled from countries in which their human rights have not been respected'.¹³ Whilst the Lords did not explicitly mention the formulation proposed by Hathaway, they closely followed his narrative. In *Horvath v Secretary of State for the Home Department*, the judges adopted a rather

⁷ *Senathirajah Ravichandran v. Secretary of State for the Home Department* [1996] Imm AR 97 United Kingdom: EWCA, 11 October 1995.

⁸ For instance, Judge Brown followed Hathaway's formalist human rights narrative by considering that breaches to the 1966 Covenant could amount to persecution *ibid*.

⁹ Judge Staughton also supported this approach, and added that the persistency criterion was an important element of the notion of persecution *ibid*.

¹⁰ See for instance the UK Immigration and Asylum Tribunal case, *Doymus v Secretary of State for the Home Department* (unreported), IAT, HX/80112/99, 19 July 2000) mentioned in Hugo Storey, 'Persecution: Towards a Working Definition' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on Migration and International Law* (Edward Elgar Publishing 2013) 459, 473.

¹¹ *Hélène Lambert*, 'The Conceptualisation of "Persecution" by the House of Lords: *Horvath v. Secretary of State for the Home Department*' [2001] 13 *International Journal of Refugee Law* 16, 22.

¹² *Islam v. Secretary of State for the Home Department; R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 UKHL (Judicial Committee), 25 March 1999, 17.

¹³ *Ibid*, 19. See other cases applying a basic human rights approach: *Hassan Adan and Others v. Secretary of State for the Home Department*, [1997] 2 All ER 723, CA, EWCA13 February 1997; 8 3 6(Risk - PDPA Member) *Afghanistan v. Secretary of State for the Home Department*, CG [2002] UKIAT 06506: restrictions against women in Afghanistan do not infringe basic human rights on a sustained and systemic basis.

similar view by considering that the element of state protection against human rights violations was also an inherent part of the notion of persecution.¹⁴ Lambert, however, observed that, in this decision, the role of state protection remained quite ambiguous. She stated that, although the House of Lords endorsed the fact that state protection was tied to the notion of persecution, it was unclear from the statements of Lord Hope of Craighead and Lord Clyde whether such protection should be taken into consideration in the persecution limb only or in the well-founded fear analysis. The latter approach was in fact more manifest in other cases, thus pointing to some departure from a literal understanding of Hathaway's model pertaining to the role of state protection.¹⁵ In spite of such uncertainty, Kneebone considered that, overall, the concept of surrogacy had become an important concept in UK jurisprudence,¹⁶ which regrettably had led to quite restrictive interpretations of the 1951 Convention.¹⁷ Although various views had been adopted on the exact role of the notion of state protection in the refugee definition, UK judges generally followed Hathaway's basic human rights framework for interpreting persecution by extensively relying on human rights norms.

Later, in *Sepet v Secretary of State for the Home Department*,¹⁸ the Lords explicitly adopted a stricter view of this model. As noted by Husain,¹⁹

¹⁴ *Horvath v Secretary of State for the Home Department* 1 AC 489, [2000] 3 WLR 379. See other cases following the same line of analysis: *Soud Nouné v Secretary of State for the Home Department*, C 2000/2666 EWCA 6 December 2000; *Secretary of State for the Home Department v. Javed and Others*, [2001] EWCA Civ 789, 17 May 2001: this case specifically mentioned the formulation used by Hathaway. *Queen on the Application of Ruslanas Bagdanavicius, Renata Bagdanaviciene v. Secretary of State for the Home Department*, [2003] EWCA Civ 1605, 11 November 2003.

¹⁵ Lambert (n 11) 25. See another case, whereby the notion of state protection is also tied to the well-founded fear limb of the definition: *Yousfi v Secretary of State for the Home Department*, [1997] UK IAT INLR 136, 1 April 1997: 'it is because the Algerian authorities are *unable* to provide *effective* protection domestically, that the appellant's fear is rendered well founded and he qualifies for international protection via asylum under the Convention'. See also a similar approach in *Svazas v Secretary of State for the Home Department* EWCA Civ 74, 31 January 2002; 'the worse the persecution, the more will be required to demonstrate the availability of adequate state protection; but that is a matter of evidence and judgment which arises once the persecution threshold has been passed'. *Kacaj Albania v Secretary of State for the Home Department*, UKIAT 00018, 19 July 2001: 'In many cases, perhaps most, the existence of the system will be sufficient to remove the reality of risk'.

¹⁶ Susan Kneebone, 'Refugees as objects of surrogate protection: shifting identities' in Susan Kneebone, Dallal Stevens, Loretta Baldassar (eds) *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge Research in Asylum, Migration and Refugee Law, 2014) 98-121, 111. Kneebone noted that the principles developed in *Horvath* have been widely followed in subsequent cases.

¹⁷ *Ibid*: Kneebone pointed out that for some decision makers, the existence of a 'sufficient' form of state protection was enough to reject a claim, as opposed to the requirement of a 'total' form of protection.

¹⁸ *Sepet v Secretary of State for the Home Department* [2003] UKHL 15 [2003] 1 WLR 856 4.

¹⁹ Husain (n 5) 147.

in this case, they followed a rigid basic human rights approach for interpreting persecution as they considered that, in the absence of a right to conscientious objection in international treaties, punishment for refusing to perform military service did not amount to persecution. The reasoning of the House of Lords in this sense demonstrated that a formalist understanding of human rights law could lead to narrow interpretations of persecution. Further to this, they added one test to Hathaway's framework by considering that the intention of the persecutor was determinative for qualifying an act as persecutory, thus slightly departing from his framework. For Lord Bingham of Cornhill, 'the reason in the mind of the persecutor for inflicting the persecutory treatment'²⁰ was fundamental to evaluate the notion of persecution. Fortunately, this approach was not upheld in the QD and, therefore, subsequent case law did not scrupulously follow this line of argumentation.²¹

In general, the definition of persecution developed by Hathaway in 1991 gained a certain influence in the UK but the modalities of this definition had been variably applied. In addition to resulting in different approaches, his framework has also led, at times, to severe outcomes. For Hussain, although this model had permitted certain advances,²² it had generally yielded 'anomalous results that [were] contrary to the protective purposes of the Refugee Convention'.²³

ii- France and Belgium: ad hoc and internally inconsistent approaches

In the same period, other European countries disregarded the human rights approach developed by Hathaway and applied different narratives, based on a case-by-case assessment of facts without relying on external

²⁰ *Sepet v Secretary of State for the Home Department* (n 20) at [23].

²¹ For instance, in cases involving harmful traditional practices, the necessity to inflict suffering or persecutory treatment was not posed as a condition for assessing the notion of persecution. See, inter alia, FGM cases in *Zainad Esther Fornah v. Secretary of State for the Home Department*, [2005] EWCA Civ. 680, 9 June 2005; *VM (FGM - Risks - Mungiki - Kikuyu/Gikuyu) Kenya v. Secretary of State for the Home Department*, CG [2008] UKAIT 00049, 9 June 2008.

²² Hussain (n 6) 148-149.

²³ Ibid 144,

benchmarks. In particular, Foster observed that references to human rights were rare in countries of civil-law tradition.²⁴

In France, Bellorgey and Valluy pointed out that no principled approach was used in the judicial system, which was rather based on the *intime conviction* of the judges.²⁵ As a result, the French judges adopted quite a vague and subjective approach to persecution. For instance, the Commission des Recours des Réfugiés (CRR), generally considered that persecution was caused by ‘grave acts’ or ‘grave acts resulting from circumstances’.²⁶ The significance of ‘grave acts’ was not defined in the legislation and no guidance was spelled out to interpret persecution. Consequently, the different sections of the CRR generally relied on ad hoc approaches with unclear methodologies to interpret the notion of persecution.²⁷ The CRR also tended to reach divergent conclusions, depending on the case at hand. This was exemplified in the case law of Algerian claimants fearing Islamist groups during the inter-confessional violence in the 1990s in Algeria. For example, in a decision dating from 1995, the CRR examined the case of a judge who had voiced his political opposition against the authorities and was sent to a locality where his life was threatened by Islamist factions. According to the CRR, the mere fact of posting him to this new locality amounted to persecution.²⁸ Little explanation was, however, provided in order to justify this decision. Later, the CRR departed from this position. The French judges found that the death threats from Islamist groups against Algerian police officers did not amount to persecution. The CRR again gave scant justification to explain their views.²⁹

²⁴ Foster (n 1).

²⁵ Valluy and Bellorgey (n 1).

²⁶ Jean Marc Thouvenin, ‘La Jurisprudence Récente de la Commission des Recours des Réfugiés : entre Continuité, Rigueur et Efforts d’Adaptation’ (1^{re} partie), [1997] 32 Revue Trimestrielle des Droits de l’Homme 599, 611.

²⁷ CRR Sections réunies 16 October 1995 M. J. n° 94010090/270619 R; CRR SR 16 June 1999 M. D. n° 97010568/319172 C+; CRR 5 Février 2003 M. S. n° 02009635/407346 R: no persecution can arise from a general situation of violence. However, in each of those cases, the court failed to present any detailed explanation as to why the applicants would not be at risk of being persecuted on the basis of an individual characteristic in this general climate of violence.

²⁸ CRR Sections réunies, 17 Février 1995, 271979 *Allali*, Rec. *ibid* 613.

²⁹ CRR Sections réunies, 12 Mars 1996 275364 *Sedikki*, Rec. 51 ; See also CRR Sections réunies, 12 Mars 1996 *Bouteraa*, Rec. 52; CRR Sections réunies 25 Novembre 1996 281357 *Bey Osman*, Rec. 61 in Jean Marc Thouvenin (n 26) 611.

The later decision applied a restrictive approach whilst the earlier one adopted a more liberal interpretation of the refugee definition. The lack of a clear interpretative framework to assess persecution in French jurisdictions, at that time, somehow affected the overall coherence of the jurisprudence and gave rise to inconsistent decisions on similar claims.

Analogous to the situation in France, no clear framework of interpretation was developed in Belgium in the same period.³⁰ However, the Belgian jurisprudence adopted a more liberal approach for assessing the notion of persecution. The judges, generally, tended to conduct a holistic analysis of the individual circumstances of the asylum seekers in order to assess the overall consequences that certain measures had on their lives. They rarely referred to violations of human rights to assess the threshold of harm, but they thoroughly analysed the life conditions of an applicant in the country of origin and evaluated the impact that the treatment endured or feared could have on individuals. For instance, the judges considered that the life of an Iraqi Christian could become ‘intolerable’³¹ in the country of origin after considering a series of discriminations and harassments as well as a risk of punishment for illegal departure. In later examples, it was admitted that a Rom activist from Bulgaria who had been repeatedly harassed by unidentified people in his country was at risk of facing persecution upon return.³² Similarly, an Armenian asylum seeker from Turkey, who argued that he had faced a series of threats and harassment from his neighbours and other unidentified people, was recognised a refugee.³³ In this case, the judges took into consideration a series of facts to conclude that an accumulation of diverse circumstances had an adverse impact both on the applicant and his family, including in the form of psychological pressure.³⁴ In general, judges in Belgium used to carry out a case-by-case assessment of the facts by considering, through a rather wide and holistic analysis, the profile and

³⁰ See *Cioroianu Florian c. L’Etat Belge*, 90/438/F169 Commission permanente de recours des réfugiés 21 January 1993: ad hoc approach for assessing persecution.

³¹ *P.S.S. c. l’Etat belge*, Commission permanente de recours des réfugiés 29 Juin 1994.

³² *Décision No. 02-0266/F1595* Commission permanente de recours des réfugiés 9 Décembre 2003.

³³ *B.M. c. l’Etat Belge*, Commission permanente de recours des réfugiés 18 April 1995. See also *P.S.S c. l’Etat belge*, Belgium : Commission permanente de recours des réfugiés, 29 Juin 1994.

³⁴ *Ibid.*

different experiences of applicants, thus seemingly conforming to the UNHCR circumstantial approach.

In light of the foregoing, it can be observed that, whilst almost all the Western European countries had signed and ratified the 1951 Convention and its 1967 Protocol by the end of the 1980s, they had developed divergent approaches for interpreting of the notion of persecution. Although the UK somehow adopted the basic human rights approach of Hathaway, France and Belgium used to reject any reference to international human rights and conducted the assessment of persecution on an ad hoc basis, leading to internally inconsistent outcomes in France and rather liberal views in Belgium.

B) Practices in Europe following the adoption of the Qualification Directive

Since the adoption of the QD in 2004, national jurisdictions have been encouraged to use human rights standards for interpreting persecution in order to ensure more harmonisation at the European level.³⁵ There has been, however, no clear methodology for doing so, and decisions have remained quite inconsistent in the Union, both in common law jurisdictions like the UK, (A) and civil law jurisdictions like France and Belgium (B).

i- A formalist human rights approach in the UK?

The QD does not seem to have fostered significant consistency in the UK. In particular, the specific role of the surrogacy principle has not been clarified and ambiguity remained regarding whether or not it should be attached to the persecution or well-founded fear limb of the Convention.³⁶ Additionally, various modalities of interpretation of the QD have been

³⁵ See detailed analysis of the QD in Chapter 3, Part 1.

³⁶ *MS (Coptic Christians) Egypt CG v Secretary of State for the Home Department* [2013] UKUT 00611 (IAC) December 2013: the element of state protection relates to the well-founded fear element. However, in *IM (Sufficiency of Protection) Malawi v Secretary of State for the Home Department* [2007] UKAIT 00071, 11 July 2007: the judges were a bit more ambiguous as to the role of state protection and applied more strictly Horvath principles.

adopted, although a rather formalist methodology seems to have been favored by British judges who often refer to human rights codified in treaties, such as the regional standards of the ECHR.³⁷ This risk of narrow interpretations has been pointed out by various authors who warned against the ambiguous wording of the QD.³⁸

For instance, in *SH (Palestinian Territories)*³⁹, the Court of Appeal interpreted the QD quite strictly by considering that only violations of non-derogable rights in the ECHR could amount to persecution, thus setting a particularly high threshold that disregards the plain text of the directive. In another case involving an accumulation of various predicaments of an economic and social nature, the Upper Tribunal considered that in order to meet the test for persecution, the restrictions faced should amount to violations of Article 3 of the ECHR (inhuman or degrading treatment or punishment).⁴⁰ In this case, the tribunal analysed the claim of an Azerbaijani unmarried mother of Russian ethnicity and Christian religion. She had a child of a mixed origin out of wedlock and, because of that, she was rejected by her family who threatened to kill her. The tribunal accepted that ‘women in Azerbaijan are treated as inferior to men and there is, for example, discrimination in the work place’,⁴¹ that the ‘mixed African/European descent would at best mean that he would stand out from the rest of the population, and at worst that he would be shunned’,⁴² and that ‘corruption is commonplace, and a system of favours may operate when looking for housing or work’.⁴³ However, the court considered that the treatment the applicant received was not contrary to Article 3 because there was evidence that the claimant could obtain a job and live a fairly decent life. This decision, however, did not assess how the accumulation of various restrictions could

³⁷ *A (Iraq) v Secretary of State for the Home Department* [2017] EWCA Civ. 944, 11 July 2017; *C (Albania) v Secretary of State for the Home Department v. the United Nations High Commissioner for Refugees (Intervener)* [2017] EWCA Civ 351, 9 May 2017; *MST and Others (national service- risk categories) Eritrea CG* [2016] UKUT 00443 (IAC), 11 October 2016.

³⁸ Refer to Chapter 3, Part 1 (A).

³⁹ *SH (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA civ 1150, 22 October 2008. Also quoted in Hussain (n 6) 152.

⁴⁰ *SL (Unmarried mother with mixed race child) Azerbaijan CG. Secretary of State for the Home Department* [2012] UKUT 00046 (IAC) 13 February 2013 at [97].

⁴¹ *Ibid* at [125].

⁴² *Ibid* at [127].

⁴³ *Ibid* at [128].

significantly impact the applicant's life in other ways, and thus, lacked comprehensive justification for rejecting this asylum claim.

Conversely, the same year in *JA Nigeria*,⁴⁴ the Upper Tribunal adopted a broader approach. The tribunal conducted an analysis based on human rights, and also adopted a more circumstantial methodology, including a subjective assessment of the frame of mind of the applicant who, in this case, was a minor. The tribunal then relied on the UNHCR guidelines by considering that 'ill-treatment which may not arise to the level of persecution in the case of an adult, may do so in the case of a child, and the child's youth immaturity, vulnerability, etc. will rightly be related to how that child experiences or fears harm'.⁴⁵ It was then concluded that the assessment of persecution depended 'upon the circumstances of [the claimants'] individual positions, their age, no doubt and their background'⁴⁶ and in this case, the appeal was allowed.

In the cases mentioned above, different human rights methodologies have been used, yielding different results. In the first two cases, the judges relied on a rather formal human rights approach, which seemed to have led to restrictive interpretations of persecution, whilst in the latter, they combined a human rights assessment of the situation with the circumstantial approach, engaging in a more holistic analysis of the situation.

A later decision in *MA (Pakistan) and Secretary for the Home Department*,⁴⁷ the judges again departed from this holistic approach and maintained a rather rigid view of what amounts to persecution. In order to demonstrate the limitations of a strict formalist approach as most often

⁴⁴ *JA (Child - risk of persecution) Nigeria* [2016] UKUT 00560 (IAC) 20 December 2016.

⁴⁵ Ibid at [16].

⁴⁶ Ibid at [26]. See also earlier cases where the Upper Tribunal proposed to engage in a holistic assessment of the claimant's circumstances, rather than a formalist human rights approach: in *MS (Coptic Christians) Egypt CG v Secretary of State for the Home Department* [2013] UKUT 00611 (IAC) 3 December 2013.

⁴⁷ *MA (Pakistan) and Secretary for the Home Department*, AA030622015 [2016] UKAITUR (28 January 2016).

applied in the UK, detailed consideration will be lent to this case in the following analysis:

i-(a) MA (Pakistan) and Secretary for the Home Department and the fallacy of a basic human rights approach

In *MA (Pakistan)*, the applicant was a married man of Shia faith, from North Pakistan, who used to work as a researcher in the Pakistan Forest Institute. He publicly denounced extensive deforestation caused by the Taliban. As a result, he was identified by the group as an opponent, and was targeted in a shooting attack in 2006. His car was hit by a bullet but the applicant managed to escape without injuries. He reported this incident to the police, but obtained no protection. He then received phone threats and a threatening letter, from individuals located in Kabul. Fearing for his safety, he eventually left his country in 2006 and went to the UK. In 2009, his wife and son received threats of kidnaping from the Taliban due to his past activities. They then joined him in the UK in the same year. The applicant's brother also received a threatening letter, with a bullet inside. The tribunal concluded that the applicant had a well-founded fear of facing harm in his home area, but believed that he could relocate without any risk.

In this case, the tribunal assessed, in conformity with the QD, different aspects of the claim by only considering external entitlements in a compartmentalised manner, without fully taking into consideration the applicant's circumstances. Firstly, the tribunal assessed the applicant's risk of harm against his freedom of opinion. Although express reference to this right was not made, the tribunal considered that the applicant's public denunciation of the deforestation caused by the Taliban was part of his work duties, rather than the mere expression of his individual opinion.⁴⁸ The tribunal concluded from these observations that it was unlikely that the applicant would reiterate his statements against the Taliban upon return. As such, he was said to be not at further risk of harm. Additionally, the tribunal did not identify any possible interference with the applicant's freedom of religion by noting that 'there is no evidence of the state preventing the

⁴⁸ Ibid at [24].

building of mosques or worship within the same for the Shia minority',⁴⁹ leading to the conclusion that there was no evidence of state-sponsored persecution in Pakistan.⁵⁰ The tribunal further stated that the applicant's relocation in Pakistan would not result in any deprivation of his human rights.⁵¹ Lastly, the applicant's argument that the judiciary system was not capable of prosecuting members of militant groups was also rejected. The tribunal considered that the evidence of individuals being released by the Supreme Court for lack of evidence is in accordance with international judicial standards as a person cannot be prosecuted or convicted without evidence, even if they are suspected of serious crimes.⁵² The tribunal eventually rejected the asylum application, by seemingly conflating the test of IFA with the one of persecution in order to conclude that the claimant was not in need of international protection.

i-(b) Compartmentalised vs holistic appreciation of harm

In this case, the tribunal implicitly considered different types of human rights norms such as freedom of religion and freedom of opinion as recommended in the QD. It also considered other rules of international law such as 'international judicial standards',⁵³ thus seemingly conforming its reasoning to the paradigm proposed by Storey.⁵⁴ The applicant's request was eventually rejected although evidence pointed to the possible existence of a risk of persecution upon return. Indeed, the abstract reasoning adopted by the tribunal based on external norms obviated other practical considerations in the case of this applicant. For instance, the tribunal considered that the judicial system met external standards in relation to the rules of evidence and concluded that there was no deficiency from this side. Whilst this is formally true, this observation disregards other concrete issues such as the high level of corruption in Pakistan and the strong influence of militant groups on the

⁴⁹ Ibid at [29].

⁵⁰ Ibid.

⁵¹ Ibid at [32].

⁵² Ibid at [41].

⁵³ Ibid at [41].

⁵⁴ See Chapter 3, Part 1 (B) Storey proposed to develop an interpretive framework based on 'severe violations of international norms', not limited to human rights standards in Hugo Storey, 'Persecution: Towards a Working Definition' in Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 459-518.

local police. Additionally, the tribunal's conclusion that the applicant did not have a genuine opinion against the Taliban also discounted important elements of his profile that could place him at risk. Indeed, the judges did not take into consideration his personal background as a researcher, specialised in forestry for several years. Whether or not he holds a firm opinion that relates to this freedom of thought is not in itself so important as it could also be considered that his level of engagement in forestry studies has led him to be adversely perceived by the Taliban, and this would be the case in any part of the country if he continued working in this sector. In order to adequately assess the notion of persecution, the applicant should not be expected to refrain from engaging in working in his own field.

With regard to his freedom of religion, the tribunal considered that Shia mosques exist and, therefore, the applicant could freely practice his religion. This element again is true but a holistic analysis of the applicant's profile, considering his membership to a religious minority, together with other factors could yield a different result. A Shia man, specialised in forestry research, who had already been identified by two powerful militant groups in his locality, might have a certain level of visibility in the whole country. This could place him at increased risk of being further identified by extremist groups and create serious threats to his personal security. As such, the harm that he is likely to face upon return might well amount to persecution. Even if he relocated, his life would be impacted in a significant manner. He would not be able to work in the same sector and would need to limit his exposure in his religious community in order to avoid threats. No effective protection of the state is to be expected in this situation given the wide influence of militant groups in Pakistan. A more general analysis of the applicant's circumstances, as well as his personal profile would have been desirable in this case in order to reach a fairer and more transparent conclusion. The formalist line of interpretation adopted by the judges unfortunately obviated practical aspects of the applicant's protection needs.

In light of the above, it can be concluded that British judges have continued to rely on human rights notions for interpreting persecution after

the adoption of the QD but they sometimes have done so in a rather inconsistent manner and, at times, have adopted narrow interpretations of the notion of persecution.

Conversely to the UK, in other countries of the European Union, such as France and Belgium, references to human rights norms or other protection standards remain quite rare. Although some references to external human rights have been sporadically made in those jurisdictions, most cases did not assess the notion of persecution in light of objective benchmarks and continue evaluating the notion through a case-by-case analysis.

ii- French jurisprudence: resistance to the adoption of a human rights framework?

The situation in France has slightly evolved since the adoption of the QD. For instance, Phuong pointed out that France (like Germany) had traditionally been reluctant to acknowledge that non-state actors could be agents of persecution if the state was not actively condoning the acts of persecution.⁵⁵ The QD has, however, clarified the role of non-state agents⁵⁶ and allowed for a wider interpretation of persecution in that sense in France. With regard to the qualitative and quantitative aspect of persecution, regrettably minimal changes have been noted.

In general, no clear methodology has been followed by French judges, who only refer to human rights as benchmarks of interpretation on an irregular basis. In fact, in some cases, the court barely provided explanation for considering the absence of persecution.⁵⁷ For instance, the Cour Nationale du Droit d'Asile (CNDA) rejected the case⁵⁸ of an Armenian man married to an ethnic Azeri woman and fearing hostility and discrimination on this

⁵⁵ Catherine Phuong, 'Persecution by Non-state Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention' [2002] 4 European Journal of Migration and Law 521, 522: on the accountability approach that has more recently been abandoned in European jurisprudence.

⁵⁶ QD (n1) Art 6.

⁵⁷ CNDA Sections réunies, 16 novembre 2011 *M. B.* n°10018108 R; CNDA 23 décembre 2013 Décision No. 11024877: no reference to any methodological approach to assess persecution is made.

⁵⁸ CNDA, ordonnance 10 octobre 2016 *M. B.* n° 16020922 C.

account. In the opinion of the court, the existence of prejudice and a sentiment of intolerance against minorities in Armenia did not amount to persecution. Unfortunately, the court did not justify this position, thus making a subjective assessment of the situation without evaluating the impact that various forms of social hostility could have on the applicants. In a different case,⁵⁹ however, the court assessed more carefully the applicant's profile against the situation in the country of origin. In this case, the applicant was a single Tamil female from Sri Lanka. The court considered various elements, such as the former membership of the applicant's brother in the Liberation Tigers of Tamil Elam (LTTE) organisation, her current isolation and high level of visibility in her locality, compounded by rampant discrimination against women in the north of country and concluded that the predicament that the applicant was likely to face upon return amounted to persecution. No reference to human rights was made, but a general analysis of the applicant's individual circumstances was conducted to evaluate the harm that she might be at risk of enduring upon return. A similar approach was adopted in a Nigerian case, where the Court engaged in a rather holistic analysis of various elements to conclude that an 'accumulation of facts' including discrimination, ostracism from one's family, amounted to persecution.⁶⁰ In these two cases, the court adopted a principled and protective approach but, regrettably, such methodology has not been consistently applied in the French jurisprudence.

For instance, in another case⁶¹, the court again adopted an unclear interpretation of persecution by rejecting a Sudanese claimant from a Darfuri African tribe on the ground that he had not established a personal experience of harm. In this case, however, the Court did not take into account the overall circumstances of the applicant's profile as a member of an African tribe often associated with rebels, who could be imputed a political opinion on that account. These elements could indeed have indicated the existence of a risk of a persecutory form of harm. The applicant was unfortunately rejected without further analysis and simply granted subsidiary protection on account

⁵⁹ CNDA, grande formation 8 décembre 2016 *Mme K* n° 14027836 C+ at [5].

⁶⁰ CNDA, 24 mars 2015 *Mlle E.* n° 10012810 C+: In this case, although the court mentioned the definition of the QD, it did not adopt a human rights interpretive framework.

⁶¹ CNDA, 3 juillet 2014 *M. S. H.* n° 13024480 C.

of the generalised violence. In general, it seems from the recent jurisprudence in France, that asylum judges have continued to interpret persecution on an ad hoc basis,⁶² without any clear line of analysis, although some sporadic references to human rights norms are notable.⁶³

iii- Belgium: a persistent reliance on a circumstantial approach?

Belgian case law has also failed to evolve significantly after the adoption of the QD. Belgian decision makers generally maintained a broad circumstantial approach when interpreting persecution.⁶⁴ For instance, in *X v Commissaire général aux réfugiés et aux apatrides*,⁶⁵ the Appeal Authority considered that the predicament of a Kurdish woman in Turkey who had faced domestic violence amounted to persecution. In this case, the Appeal Authority argued that ‘the assessment of a well-founded fear of persecution should take into account her individual circumstances, including psychological and physical trauma’.⁶⁶ The harm that the applicant faced was assessed in light of her profile and cumulated experiences, without reference to human rights standards, eventually yielding a positive result for this applicant.⁶⁷

The same interpretive pattern was applied in other cases. For instance, in *Council for Alien Law Litigation, Case No. 101488*, the judges

⁶² See other cases where the court adopted variable methodologies for interpreting persecution. In CNDA, 21 mai 2012 *M.W.* n° 08019247 C+, the court stated that the repression against a racist man in Namibia from the state authorities did not amount to persecution because it was neither ‘systematic, nor discriminatory’ nor ‘disproportionate’ in CNDA 1er septembre 2011 *Mme F ép G et Mlle G n°s 10018546 et 10018545 C+*: various acts of discriminations do not amount to persecution without clear explanation as to why they are not considered serious enough. However, in CNDA 18 mars 2016 *M.K* n° 15031443: accumulation of stigmatization, ostracism and discrimination amount to persecution.

⁶³ See for instance case whereby by the rapporteur of the court questioned whether the consideration of a right to a normal private life (absence thereof) could be relevant to assess the notion of persecution in an LGBTI case: CNDA, 8/06/09, 609800/07012945 in Caroline Kobelinsky, ‘L’Asile Gay, Jurisprudence de l’Intime à la Cour Nationale du droit d’Asile’ [2012] 82 Droit et Société 583, 592. In this case however, the court avoided answering this question by displacing the analysis of the refugee definition onto the well-founded fear terrain. See other case with references to human rights by the court: CNDA 4 Janvier 2011 *Mme H.* n° 10000337 C+: this case mostly referred to national human rights. See also: CNDA, 24 mars 2015 *Mlle E* n° 10012810 C+.

⁶⁴ Belgium: Conseil du Contentieux des Etrangers, 27 October 2016; *Arrêt n° 138 876*, Belgium: Conseil du Contentieux des Etrangers, 19 Février 2015; *Arrêt n° 90 730*, Belgium: Conseil du Contentieux des Etrangers, 30 October 2012: in this case the CCE considered that the accumulation of discriminations faced by the Applicant, compounded by her fragile mental state, amounted to persecution.

⁶⁵ *X v Commissaire général aux réfugiés et aux apatrides*, No 177, 178: Conseil du Contentieux des Etrangers, 27 Octobre 2016 [2017] International Journal of Refugee Law 29, 138.

⁶⁶ Ibid.

⁶⁷ Ibid, 139.

assessed the risk of persecution of a Senegalese applicant who was homosexual. It was considered that the penalisation of homosexuality alone did not amount to a risk of persecution per se, thus seemingly conforming to the guidance of the CJEU. However, in order to reach the decision, the judges engaged in a more thorough analysis of the situation in the country, including the level of stigmatisation faced by homosexuals and how such elements could impact the applicant in light of his personal circumstances.⁶⁸ For the judges, the level of stigmatisation⁶⁹ that the applicant was at risk of facing depended on several factors including ‘his personal experiences, the attitude of his family and his entourage, his social and economic situation, his professional profile and cultural background as well as whether or not he lives in an urban area’.⁷⁰ Although the judges mentioned the definition of the QD,⁷¹ they did not in fact assess the notion of persecution in light of fundamental human rights but rather, they proposed to take into consideration the applicant’s practical circumstances, eventually rejecting the asylum claim as a number of facts could not be established. In this case, the rejection appeared quite fair and transparent given the comprehensive assessment conducted by the judges.

In another similar case, a claimant who was also a homosexual man from Senegal was granted refugee status due to a diverse set of circumstances.⁷² Again, an overall assessment of his background and experiences, against the conditions in the country, was conducted to reach this decision. In general, Belgian judges seemed to have maintained their circumstantial approach, and there was little evidence that they had significantly changed their interpretive methodology since the QD.⁷³

⁶⁸ *Arrêt n° 10148824*, Belgium: Conseil du Contentieux des Etrangers Avril 2013 at [5.21].

⁶⁹ *Ibid*, 11.

⁷⁰ *Ibid*, 10.

⁷¹ *Ibid*, at [5.17] 11.

⁷² *Arrêt n° 50967* Belgium: Conseil du Contentieux des Etrangers, 9 Novembre 2010.

⁷³ For instance, see *Arrêt n° 177 178* Belgium: Conseil du Contentieux des Etrangers, 27 Octobre 2016: in this case, the judges took into consideration the applicant’s very fragile mental state to assess the notion of persecution and recognized her. See also similar case for a man from Kosovo: *Arrêt n° 138 404*, Belgium: Conseil du Contentieux des Etrangers, 12 Février 2015; *Arrêt 89 927*, Belgium: Conseil du Contentieux des Etrangers, 17 Octobre 2012. No human rights framework was adopted in any of the above cases.

In light of the above, it can be observed that the adoption of the QD has not yet fulfilled its objective of harmonisation in Europe. Battjes in particular pointed to the persisting variations of interpretation in EU countries which, according to him, are due to the vague and general wording of the QD.⁷⁴ In spite of some advances, the QD has not fostered significant consistency since its adoption, nor has it encouraged a more protective approach in countries of the EU. It seems in fact that decision makers who have engaged in a broader analysis, similar to the circumstantial framework of the UNHCR, have reached fairer and more transparent conclusions. However, this has been done in quite inconsistent ways.

Part 2) Irregular reliance on a human rights framework by common-law jurisdictions outside the EU

Other countries signatories to the 1951 Convention have also developed their own jurisprudence for interpreting persecution. In particular, in New Zealand (A), Australia (B), Canada (C) and the USA (D), judges have adjudicated a great number of asylum claims involving complex issues relating to the notion of persecution. However, in doing so, they have adopted different interpretive narratives as the section below will demonstrate.

A) New Zealand: the human rights narrative used as a guiding framework

New Zealand signed and ratified the 1951 Convention Relating to the Status of Refugees in 1960 and acceded to the 1967 Protocol in 1973.⁷⁵ The refugee definition was not incorporated into domestic law until 1999.⁷⁶ Therefore, before that period, the procedures for refugee determination were considered the mere prerogative of the Executive.⁷⁷ After the 1980s, New

⁷⁴ Vincent Chetail, Philippe De Bruycker, Francesco Maiani (eds) *Reforming the Common European Asylum System: The New European Refugee Law* (Brill Nijhoff 2016) 200.

⁷⁵ UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol', available at <http://www.unhcr.org/protect/PROTECTION/3b730d63.pdf>, 3.

⁷⁶ Immigration Amendment Act 1999, Section 40, Part 6A.

⁷⁷ Bruce Burson, 'Give way to the Right: The Evolving Use of Human Rights in New Zealand Refugee Status Determination', in Bruce Burson and David James Cantor (eds) *Human Rights and the Refugee Definition, Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 25-48, 26.

Zealand saw an increase⁷⁸ in new asylum seekers coming into the country.⁷⁹ Due to a certain upsurge in asylum applications, domestic judges began adjudicating a growing number of claims and, in doing so, they developed a detailed jurisprudence on the interpretation of the notion of persecution.

In particular, the Refugee Status Appeal Authority (RSAA) started regularly referring to human rights for interpreting the notion of persecution in the early 90s,⁸⁰ after the human rights framework was developed by Hathaway. New Zealand judges, however, did not consistently apply the modalities of this basic human right model. In fact, the evolution of the jurisprudence in New Zealand seemed to have followed a line of progressive emancipation from Hathaway's narrative.

For instance, in an early case, *Refugee Appeal No. 11/91*, the RSAA relied on the UDHR and ICCPR to assess whether the nature of the threats received by a Sikh Indian man amounted to persecution.⁸¹ In this decision, the judges stated that 'the threat made to kill the appellant, if carried out, would be an infringement of a core human right' as formulated in Article 3 of the UDHR and Article 6 of the 1966 ICCPR.⁸² The judges seemed to adopt here the basic human rights paradigm proposed in the LORS but they did not endorse the threshold of 'sustained or systemic' violations. They also rejected the fact that state protection was part of the persecution test. They stated that 'the harm originally feared [was] of sufficient gravity to constitute persecution' per se, but then they went on to reject the claimant's request, considering that he could avail himself of the protection of the authorities.⁸³

⁷⁸ Ibid 25.

⁷⁹ Rodger Haines, 'Gender-Based Persecution: New Zealand Jurisprudence' [1997] 9 International Journal of Refugee Law 129, 129. This increase of asylum seekers can be relativized compared to other common-law jurisdictions. Indeed, Haines noted that due to its isolated geographical position, the number of asylum applications remained relatively 'modest on a world scale'.

⁸⁰ Ibid 138: Haines noted that, in this period, the interpretation of persecution in the jurisprudence was following the one of James Hathaway. See also numerous cases referring to various human rights to interpret the notion of persecution quoted in *Refugee Appeal No 2039/93 Re MN, RSAA (12 February 1996)*; *Refugee Appeal No. 10/91 Re CPY* (27 August 1991); *Refugee Appeal No. 14/91 Re JS* (5 September 1991) (derogation); *Refugee Appeal No. 29/91 Re SK* (17 February 1992); *Refugee Appeal No. 150/92 Re SS* (9 December 1992) 9; *Refugee Appeal No. 135/92 Re RS* (18 June 1993) 23; *Refugee Appeal No. 265/92 Re SA* (29 June 1994) 12; *Refugee Appeal No. 732/92 Re CZZ* (5 August 1994) 13-17; *Refugee Appeal No. 1222/93 Re KN* (5 August 1994).

⁸¹ *Refugee Appeal No. 11/91 Re S RSAA* (5 September 1991).

⁸² Ibid.

⁸³ Ibid.

In this case, the judges clearly separated the tests of persecution and state protection. According to Kneebone, this approach became a general trend in New Zealand as she observed that decision makers tended to ‘identify the issue of surrogate protection [...] within the objective part of the well-founded fear test’⁸⁴ rather than subsuming it under the persecution test, thus departing significantly from Hathaway’s view.

Additionally, New Zealand judges seemed to have considered early on the possibility of expanding the human rights narrative by analysing various other elements of an applicant’s claim. For instance, in cases of gender-based violence, Haines pointed out that, in the late 90s, some judges adopted a more circumstantial approach as they proposed to take into consideration ‘various acts of discrimination, in their cumulative effect’ and assess how such acts could ‘deny human dignity’.⁸⁵ The jurisprudence then continued to evolve in a singular manner. Some cases further departed from the formalist human rights approach by following this circumstantial methodology. For instance, in *Refugee Appeal No 74665/03 (7 July 2004)*, the judges considered that:

‘while it is possible to identify distinct categories of obligations [...] the question whether the anticipated harm rises to the level of being persecuted depends not on a rigid or mechanical application of the categories of rights, but on an assessment of a complex set of factors which include not only the nature of the right threatened, but also the nature of the threat of restriction and the seriousness of the harm threatened’.⁸⁶

In this case, the judges seemed to broaden the scope of persecution by considering that the human rights narrative should not be adopted in a rigid manner but, instead, a larger set of facts should be evaluated.

⁸⁴ Kneebone (n 16) 114.

⁸⁵ Haines (n 79) 138.

⁸⁶ *Refugee Appeal No. 74665 RSAA (7 July 2004)* at [80].

Whilst some decision makers adopted a singular approach for interpreting the notion of persecution, it should be noted that New Zealand judges in general remained influenced by Hathaway's paradigm as they tended to regularly refer to human rights for interpreting the notion of persecution.⁸⁷ Consistently with the dominant human rights narrative at that time, judges used to consider that only the treaties of the International Bill of Rights constituted relevant references for evaluating what forms of harm amount to persecution. Burson, however, noted that some domestic judges progressively strayed away from this model, perceived as being too rigid. In a handful of cases, the judges expanded their scope of analysis and progressively started referring to other treaties, such as specialised human rights treaties for interpreting persecution.⁸⁸ The view that specialised human rights treaties could also be valuable for interpreting persecution was only endorsed by Hathaway in 2014.

As early as 2005, the RSAA also rejected Hathaway's proposal that a hierarchy of rights should be considered for interpreting persecution. In *Refugee Appeal Nos 75221 and 75225 (23 September 2005)*,⁸⁹ RSAA considered possible violations of the ICESCR but made very clear that 'overly rigid categorisations of rights in terms of hierarchies are [...] to be avoided',⁹⁰ thus enlarging the array of possible human rights standards that could be considered relevant when interpreting the definition of a refugee. In a recent case, *DS Iran 800788 (2 February 2016)*, the judges of the Immigration and Protection Tribunal further emphasised the benefits of interpreting the notion of persecution through a wider human rights framework as they affirmed that 'given the non-hierarchical approach to human rights which applies in New Zealand [...] a broad range of harm is [...] potentially within the scope of Convention-based protection'.⁹¹ Again,

⁸⁷ *Refugee Appeal No. 71404/99* RSAA (29 October 1999), referring to *Refugee Appeal No. 1039/93 Re HBS and LBY* RSAA (13 February 1995), 19-20; *Refugee Appeal No 2039/93 Re MN* RSAA (12 February 1996) 14-16. Mentioned in Rebecca Dowd, 'Dissecting Discrimination in Refugee Law: an Analysis of its Meaning and its Cumulative Effect' [2011] 23 *International Journal of Refugee Law* 28, 32.

⁸⁸ Burson (n 77) 34. See also *Refugee Appeal Nos. 76226 and 76227* RSAA (12 January 2009), at [88] and [102] the RSAA refers to the CEDAW and at [111] to the CRC.

⁸⁹ *Refugee Appeal No. 75221 and 75225* RSAA (23 September 2005).

⁹⁰ *Ibid.*, para 81.

⁹¹ *DS (Iran) 800788* NZIPT (2 February 2016) at [177].

on this point, the jurisprudence in New Zealand seemed to have anticipated the desirable evolution of the human rights interpretive framework. Hathaway only followed this view when he abandoned his theory on the hierarchy of rights in the last edition of the LORS.

Although judges in New Zealand jurisprudence have retained the idea that basic human rights were valuable benchmarks for interpreting persecution, they have used different parameters of interpretation to factor in their human rights analysis. Indeed, they usually combine the human rights approach with a more pragmatic methodology by assessing various forms of restrictions. Judges continue to explicitly mention Hathaway's model as a reference in their decisions but in practice they rather rely on the notion of 'serious harm' for assessing persecution.⁹² This tendency has recently been observed by Cantor who noted that Hathaway's narrative is perceived as setting an imprecise threshold and, therefore, some decision makers have felt compelled to developing more pragmatic approaches through the 'serious harm test'.⁹³ For instance, in *Refugee Appeal No. 76015 (4 November 2007)*, the RSAA mentioned that for a violation of the ICESCR to amount to persecution, '[t]he breach must go to the core of the right and must occasion *serious harm*. A breach at the margins of a right or one that does not bring about *serious harm*, will not reach the being persecuted threshold'.⁹⁴ In fact, this approach developed in the jurisprudence proved to be more protective of the rights of refugees and more transparent, as judges seemed to be encouraged to assess a larger variety of factors in order to assess the level of 'seriousness' of the harm.

This approach was exemplified in a recent case, in *AB (Slovakia), AF (Czech Republic)*, where the Immigration and Protection Tribunal had granted refugee status to members of a Roma family from Slovakia. The

⁹² *Q (Pakistan) 800675* NZIPT (29 April 2015) at [35]; *BN (Fiji) 800688* NZIPT (20 April 2012) at [29]. *AC (Lebanon) 800688* NZIPT (5 March 2015) at [31] In these cases, the test of persecution according to Hathaway's formulation is supplemented with the test of 'serious harm'.

⁹³ James Cantor, 'Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm' in Burson Bruce and David James Cantor (eds), *Human Rights and the Refugee Definition Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 349-395, 383.

⁹⁴ *Refugee Appeal No. 76015* RSAA (4 Nov. 2007) para. 37 quoted in Dowd (n 87) 47.

claimants related a series of harassments, verbal abuse, random physical attacks by strangers and skinheads in their country for many years. The tribunal did not analyse their predicament only in light of basic human rights but also considered that ‘if the family were to return to their village, the harassment and mistreatment would immediately resume at the same, undoubtedly serious level’.⁹⁵ The tribunal assessed the series of predicaments faced by the family in the aggregate and concluded that it was sufficiently serious, thus lending a major importance to the quantitative aspect of persecution.

In conclusion, it can be observed that asylum judges in New Zealand initially adopted Hathaway’s narrative, but they seemed to have progressively departed from it, in order to develop more practical approaches. The assessment of whether a harm constitutes persecution is therefore assessed on a case-by-case basis with the human rights narrative mostly used as a guiding framework, but not confined to it. This approach echoes the view of Foster who considered that ‘human rights treaties are designed to provide guidance, not to constitute an inflexible grid which dictates the outcome in every case’.⁹⁶

B) Australia: variable approaches to the notion of persecution as a result of jurisprudential tensions with the statutory definition

Australia signed and ratified the 1951 Convention in 1954 and the Protocol in 1973.⁹⁷ In the 1980s, the refugee definition was incorporated into national law when the Migration Act was amended.⁹⁸ Similarly to the evolution observed in New Zealand, Australian Courts progressively acknowledged the importance of human rights in interpreting the refugee

⁹⁵ *AB (Slovakia), AF (Czech Republic)* [2015] NZIPT 800734-738, 29 June 2015.

⁹⁶ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 79.

⁹⁷ UNHCR (n 75) 2.

⁹⁸ Migration Amendment Act (N.2) 1980, No -175. See also J. Kirk, ‘Island Nation: The Impact of International Human Rights Law on Australian Refugee Law’, in Burson Bruce and David James Cantor (eds), *Human Rights and the Refugee Definition, Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 49-85, 49.

definition.⁹⁹ For the first time in 1989, judges considered that persecution could be defined through references to human rights violations in *Chan vs. Minister for Immigration and Ethnic Affairs* but they referred to the UNHCR Handbook to justify this view.¹⁰⁰ Although the judges noted that human rights constituted relevant interpretive references, they did not further explore this line of argumentation. However, by introducing the concept of human rights into their legal analysis, they set the foundation for the development of a new jurisprudence. Human rights then became increasingly referred to in the 1990s, when Hathaway published the first edition of the LORS.¹⁰¹ Although his definition was not always expressly quoted and uncertainty remained as to which human rights were relevant, a certain influence of his paradigm on Australian judges was quite noticeable. For instance, in *Applicant A v MIEA*, Brennan observed that ‘when a person has a well-founded fear of persecution, the enjoyment by that person of his or her fundamental rights and freedoms is denied’. In the same case, Dawson J affirmed that: ‘there is general acceptance that a threat to life or freedom for a Convention reason amounts to persecution’.¹⁰² They thus demonstrated a certain inclination to rely on human rights norms for interpreting persecution.

In spite of this perceptible evolution, Kirk pointed out that the use of basic human rights standards raised some controversy amongst Australian judges. Indeed, she highlighted the emergence of two distinct jurisprudential trends regarding the role that human rights should have in interpreting persecution. On the one hand, she noted that some judges were inclined to refer to human rights because they viewed the 1951 Convention as an

⁹⁹ Alex de Costa, ‘Assessing the Cause and Effect of Persecution in Australian Refugee Law: Sarrazola, Khawar and the Migration Legislation Amendment Act’ [2001] 30 Federal Law Review 535, 558. De Costa pointed out that ‘the reference to the Universal Declaration of Human Rights 1948 (‘the Universal Declaration’) in the Convention’s preamble marks it as an instrument for the protection and realization of human rights has been acknowledged in Australian refugee jurisprudence’.

¹⁰⁰ *Chan vs. Minister for Immigration and Ethnic Affairs* HCA 62; 169 CLR 379 F.C. 89/034, (9 December 1989) at [23].

¹⁰¹ *Case No. N93-02362 RRTA* 369 (27 February 1995) at 3; *Case No. N93-02050 RRTA* 484 (10 March 1995) at 3; *Wang v. Minister for Immigration and Multicultural Affairs*, FCA 1599 (10 November 2000); *NACM of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* FCA 1554 (22 December 2003) at [54]; *Minister for Immigration and Multicultural and Indigenous Affairs v Sarrazola* FCA 263 (21 March 2001) at [31].

¹⁰² *Applicant A v Minister for Immigration and Ethnic Affairs* HCA 190 CLR 225 (24 February 1997) at 232, mentioned in Mirko Bagaric, Kim Boyd, Penny Dimopoulos, John Vrachnas (eds), *Migration and Refugee Law: Principles and practice in Australia* (CUP 2005) 223.

instrument providing a surrogate human rights protection to refugees.¹⁰³ On the other hand, she also observed that some judges were more reluctant to adopt such an approach because they considered that the primary objective of the Convention was to regulate and control refugee flows rather than protect human rights.¹⁰⁴ Her analysis pointed to a certain hesitation of the Australian judges to actively endorse the human rights narrative.

Kirk also observed that, in the early 2000s, some judges dissociated themselves with Hathaway's formalist narrative in order to adopt a more expansive interpretation of persecution.¹⁰⁵ For instance, in *Kord v Minister for Immigration and Multicultural Affairs*, Judge Hely considered that the definition of Hathaway was too restrictive and that 'unjustifiable and discriminatory conduct, officially tolerated, directed at an applicant by reason of his race [constituted] persecution unless the impact of that conduct on the applicant [was] trivial or insignificant.'¹⁰⁶ In this decision, Judge Hely seemed to imply that any form of harm that creates an impact on an individual's life which is more than trivial or insignificant could possibly amount to persecution, which appears overly large. In another case,¹⁰⁷ judge Wilcox also adopted a rather broad interpretation of persecution by stating that 'being denied the opportunity to work in [the applicant's] chosen field was sufficient'¹⁰⁸ to warrant refugee status. No further explanation was given to assess the level of harm that this sort of predicament can cause. Some Australian judges therefore started developing a broader understanding of the notion of persecution, without following any clear line of analysis to justify their position. Dimopoulos and Bagaric regretted this trend¹⁰⁹ as they considered that Australian judges had enlarged the notion of persecution to such an extent that even a 'slight harm' could entitle an asylum seeker to

¹⁰³ See for instance: *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* HCA 55 S156/1999 (26 October 2000) at [65]; *Wang v Minister for Immigration and Multicultural Affairs*, FCA 1599 (10 November 2000) at [80].

¹⁰⁴ Kirk (n 98) 49.

¹⁰⁵ Ibid 50.

¹⁰⁶ *Kord v. Minister for Immigration and Multicultural Affairs*, FCA 1163 (24 August 2001) para 15.

¹⁰⁷ Kirk (n 98) 64.

¹⁰⁸ Kirk *ibid*.

¹⁰⁹ Regarding this trend see also *Minister for Immigration and Multicultural Affairs v Khawar*, FCA N 1379 (23 August 2000), where Judge Hill J stated at [8] that 'Persecution involves, in a general sense, an element of harm which is not insignificant'.

refugee status.¹¹⁰ They summarised how Australian decision makers interpreted the notion of persecution by identifying two major, conflicting, trends in the jurisprudence: ‘the first is that the concept of persecution is connected with notions of human rights and dignity. Secondly, persecution can include the deprivation of interests that do not come close to threatening subsistence.’¹¹¹

In view of these jurisprudential developments (amongst other reasons), the Australian Parliament decided to narrow down the definition of a refugee in order to avoid too generous an approach to the 1951 Convention. As a result, in 2001, the Parliament passed a new law, introducing a statutory definition of the notion of persecution, which entailed a threefold analysis.¹¹² According to Section 91 R of the Migration Act:

Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

- (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
- (b) the persecution involves serious harm to the person; and
- (c) the persecution involves systematic and discriminatory conduct.

This new definition was meant to clearly limit the interpretational activity of the judges and to provide a restrictive understanding of the definition of a refugee in the 1951 Convention. It is noteworthy that the new statutory definition raised the reasons for persecution as an essential component of the notion of persecution which was not the approach adopted

¹¹⁰ Mirko Bagaric and Penny Dimopoulos, ‘The Shifting Meaning of Persecution in Australian Refugee Law: How Much Must One Suffer to be Deserving of Asylum?’ [2003] Bond Law Review Editorial Committee 314, 314.

¹¹¹ Ibid 322.

¹¹² Migration Legislation Amendment Act (No 6.) 2001 Section 91R(1).

by judges before this. Additionally, the statutory definition imposed a relatively strict threshold by stating that persecution should cumulatively involve systematic and discriminatory conduct and serious harm. By adding these new criteria, the Parliament adopted an approach that stringently restricted the interpretive creativity of Australian judges and further limited the potential of the human rights narrative that had been used in a rather inclusive manner thus far.¹¹³

In spite of these changes, Kirk noted that the legislation in fact ‘received limited attention from Australian Courts’,¹¹⁴ which continued interpreting the notion of persecution quite broadly and, in practice, with some sporadic references to international human rights standards through ad hoc interpretive schemes.¹¹⁵ For Croc, however, the judges who used human rights as referential benchmarks remained a minority.¹¹⁶ It seemed that, in fact, no consistent methodology was relied upon. For instance, Bagaric et al pointed out that the notion of serious harm in the legislation was quite broad and could be understood in different ways, so that there was ‘ample scope for divergent judicial interpretations’.¹¹⁷ It appears, indeed, that judges oscillated between referring to human rights or evaluating the notion of serious harm through more subjective lenses. Kneebone also highlighted the

‘uncertainty as to the interrelationship between Section 91R and the Refugee Convention’. She pointed out that ‘in some cases, the judges have confirmed that the Refugee Convention applies “without limiting” the statute (*SAAO v Minister for Immigration*, 2002). In others, judges have queried whether s 91R limits the Refugee Convention (*SBBG v Minister for*

¹¹³ In this sense, Kneebone argued that Section 91R seems ‘to mask the explicit articulation of the human rights framework’ in Susanne Kneebone ‘The Australian Story: Asylum Seekers Outside the Law’, in Susanne Kneebone (eds) *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (CUP 2009) 171–227, 222.

¹¹⁴ Kirk (n 98) 68.

¹¹⁵ For instance, see Judge Kirby who specifically referred to the Hathaway’s definition of persecution in *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* HCA 29 S70/2004 (26 May 2005) para 111. However, in *Case No.0903537*, RRTA 851 (30 July 2009) a more circumstantial approach based on the concept of discrimination was relied upon.

¹¹⁶ Mary Croc, ‘Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law’ [2004] 26 Sydney Law Review 51.

¹¹⁷ Bagaric et al. (n 102) 225.

Immigration, 2003). In yet others, the judges have suggested that it does (*WADP v Minister for Immigration*, 2002) but in others, that the two are consistent (*VBB v Minister for Immigration*, 2003; *SCAT v Minister for Immigration*, 2003, per Madgwick and Conti JJ).¹¹⁸

Kneebone further explained that some uncertainty had arisen in relation to the notion of surrogate protection, which was, at times, tied to the notion of persecution and, at other times, examined under the overall phrase ‘fear of persecution’,¹¹⁹ thus variably attached to the ‘well-founded fear’ test or to persecution. Similarly, De Costa had also pointed to the different approaches with regard to the role of state protection where persecution is perpetrated by non-state agents.¹²⁰

Due to the absence of concrete changes in the jurisprudence and the internally inconsistent approaches adopted by Australian judges, the Parliament passed a second amendment to the Migration Act in 2014, amending the onshore protection visa regime of individuals coming to Australia. The amendment removed references to the 1951 Convention in the Migration Act in an attempt to create a ‘new independent and self-contained statutory framework’,¹²¹ thus isolating Australian Courts from the influence of other international jurisprudences and from international human rights law.

Since then, references to international human rights are less common, with ad hoc approaches being rather adopted.¹²² Very broad decisions are also

¹¹⁸ Susan Kneebone, ‘What we Have Done with the Refugee Convention: The Australian Way’ [2005] 22 Law in Context 83.

¹¹⁹ Kneebone (n 16) 110.

¹²⁰ See analysis in Alex de Costa, ‘Assessing the Cause and Effect of Persecution in Australian Refugee Law: Sarrazola, Khawar and the Migration Legislation Amendment Act’ [2001] 30 Federal Law Review 535.

¹²¹ Explanatory Memorandum to the Migration and Maritime Powers Legislation (Resolving the Legacy Caseload) Bill 2014, 168 at [1153]. Available at http://www.austlii.edu.au/au/legis/cth/bill_em/mamplatalcb2014832/memo_0.html.

¹²² Inter alia: *Case No. 1420100*, AATA 4383 (6 September 2016); *Case No. 1501978* AATA 3621 (9 November 2015); *Case No. 1605812*, [2017] AATA 158 (16 January 2017): None of these cases relied on a human rights approach.

rare.¹²³ However, in some cases, Australian judges have continued adopting quite expansive interpretations of persecution, and at times, have continued to refer to human rights norms. In particular, Kirk mentioned two recent cases, *SZTEQ v Minister for Border Protection*¹²⁴ and *Minister for Immigration and Border Protection v WZAPN*,¹²⁵ whereby the courts recently reiterated that the refugee definition should be applied consistently with international standards. In *SZTEQ v Minister for Border Protection*, the court referred to human rights law and human rights contained in the International Bill of Rights in order to analyse the notion of persecution. The court further expanded the human rights framework by adding that this interpretive scheme should be applied as part of a holistic analysis.¹²⁶ In this case, the judges considered that the assessment of a violation of a human right should be compounded by other considerations relating to the personal circumstances of the asylum seeker. The court later concluded that not every deprivation of liberty constitutes persecution but that it was in fact a matter of degree and circumstances.¹²⁷ In this case, the court relied on a loose human rights narrative as part of the analysis of what constitutes persecution and complemented it with other considerations based on circumstantial elements, thus adopting a more pragmatic approach, similar to the position developed by the UNHCR.

This view was also adopted in a recent case whereby the Appeal Tribunal considered a wide variety of factors in order to assess the seriousness of the harm feared by an Indonesian single woman, head of a household, of minority Chinese ethnicity and who had faced abuses and ostracism in the local community on account of her disability. The tribunal noted that the prevailing ‘societal norms (in Indonesia), compounded by difficulties in accessing employment, facilities and services, mean that people with

¹²³ See for instance: *Case No. 1503327, AATA 4341 (24 August 2016)*, *Case No. 1502343, AATA 4053 (6 July 2016)*: the applicant’s claim was rejected after circumstantial analysis of her claim rather than a human rights approach.

¹²⁴ *SZTEQ v Minister for Border Protection*, FCAFC 39 (11 February 2015), cited in Linda J. Kirk (n 100), 69.

¹²⁵ *Minister for Immigration and Border Protection v WZAPN*, HCA 22 (17 June 2015), cited in Linda J. Kirk (n 98) 69.

¹²⁶ *SZTEQ v Minister for Border Protection* (n 124) at [92].

¹²⁷ *Ibid* [155].

disability in Indonesia face a high degree of societal and official discrimination'.¹²⁸ It was further considered that another factor increasing 'the seriousness of the harm on the applicant is the fact that she is a single mother' and thus was exposed to stigma in her country.¹²⁹ Through a holistic analysis, the decision makers concluded that the applicant had a well-founded fear of facing persecution upon return to Indonesia.

In light of the foregoing, it can be concluded that the conceptual battle between the Australian Parliament and Australian judges on the definition of persecution had led to the application of different approaches for interpreting the notion. At times, judges had relied on a human rights narrative, through different parameters, whilst some recent cases adopted a more circumstantial approach, allowing for a broad application of the refugee definition, which the Australian Parliament has tried so far to restrict. It seems that in the case of the Australian jurisprudence, the human rights narrative has been used in a rather protective manner, to expand the understanding of the notion of persecution without strictly referring to the framework modalities proposed by Hathaway. Unfortunately, the jurisprudence remains, overall, internally inconsistent because no clear interpretive framework has so far been adopted in spite of the legislation introduced by the Australian parliament. In this sense, Kneebone noted that the narrative used by decision makers is 'both pragmatic and confused',¹³⁰ thus raising legal uncertainty for individuals who seek asylum in Australia.

C) Canada: an unclear interpretive practice underpinned by a human rights approach?

Canada signed and ratified the 1951 Convention and the 1967 Protocol in 1969. Similarly to the evolution observed in other countries, the Canadian jurisprudence developed quite significantly in the 1980s.¹³¹ At that time, there was no specific legal framework for interpreting the notion of

¹²⁸ *Case No. 1419893 AATA 4338* (19 August 2016) at [43].

¹²⁹ *Ibid* [44].

¹³⁰ Kneebone (n 16) 112.

¹³¹ Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (OUP 2011) 13-14.

persecution. In fact, Simeon observed that in early decisions, judges were quite reluctant to refer to international human rights standards as an interpretive narrative for applying the 1951 Convention,¹³² which he attributed to the complex dual legal system where international human rights cannot be directly invoked before courts by citizens. He noted that, in 1982, the country adopted the Charter of Rights and Freedoms that, in substance, is similar to the International Bill of Rights, and most certainly led judges to favour national human rights, instead of international norms.¹³³

In the 1990s, the influence of Hathaway's approach on the jurisprudence became, however, quite significant. At that time, domestic judges started to rely increasingly on basic human rights standards in order to interpret the 1951 Convention and, more particularly, the notion of persecution. For instance, in 1993, in the seminal decision of *Canada v Ward*, the Supreme Court of Canada explicitly referred to Hathaway's definition of persecution as a guiding principle to interpret the notion¹³⁴ but then departed from this approach, by considering that state protection should not be considered an inherent component of persecution. Indeed, Kneebone observed that in this case, Judge La Forest tied the test of state protection to the well-founded fear limb of the refugee definition rather than the notion of persecution.¹³⁵

In subsequent cases, references to Hathaway's narrative were still notable but judges tended to consistently stray away from some of the modalities of his framework. In 1994, in *Ramirez v. Solicitor General of Canada*, the Federal Court adopted Hathaway's view that the International Bill of Rights should be used as a relevant benchmark to assess persecution as the court considered that 'protection from property confiscation is a fourth-level right'.¹³⁶ The court went on to conclude that a violation of this right does

¹³² James C. Simeon, 'The Human Rights Bases of Refugee Protection in Canada' Burson Bruce and David James Cantor (eds), *Human Rights and the Refugee Definition Comparative, Legal Practice and Theory* (Brill Nijhoff 2016) 86-108, 105.

¹³³ Ibid.

¹³⁴ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court.

¹³⁵ Kneebone (n 16) 108.

¹³⁶ *Ramirez v. Solicitor General of Canada* [1994] FCJ No.1888, Canada: Federal Court, Trial Division.

not per se amount to persecution because it is not of sufficient gravity.¹³⁷ The Court implicitly rejected the persistency criteria by not mentioning it, and rather based its analysis of the notion of persecution on the concept of ‘gravity’. In 1995, in *Narvaez*, the Federal Court of Canada also expressed the view that the 1951 Convention was premised on the respect of fundamental human rights and that Hathaway’s human rights scheme should be used to interpret persecution¹³⁸ but again, the rest of his framework was not referred to. Conversely, the Supreme Court adopted a more consistent approach to Hathaway’s model in *Chan v Canada*¹³⁹ by stating that ‘the concern of refugee law ought to be the denial of human dignity in any key way with the sustained or systemic denial of core human rights as the appropriate standard’.¹⁴⁰ From the above, it can be observed that international human rights, as entailed in the International Bill of Rights, had progressively been relied upon in Canadian jurisprudence to assess the notion of persecution, in spite of the initial reluctance of decision makers to refer to these standards. It seemed, however, that Canadian judges adopted ad hoc human rights approaches by not consistently relying on the modalities defined in Hathaway’s framework.

In 2001, the Immigration and Refugee Protection Act (IRPA) incorporated into domestic law the 1951 refugee definition and further enlarged the realm of refugee protection. According to the Act, refugee status is conferred on individuals who meet the criteria set out in the 1951 Convention but also to other individuals ‘in need of international protection’,¹⁴¹ including individuals at risk of torture in the meaning of the Convention against Torture from 1984.¹⁴² While the present discussion focuses on the methodology adopted by Canadian judges to interpret the notion of persecution, it is beyond the purview of this analysis to further assess the broad character of the Canadian approach to asylum. It is, however,

¹³⁷ Ibid.

¹³⁸ *Cecilia Narvaez, Miguel Alexandro Narvaez et Daniel Antonio Narvaez c. Ministre de la Citoyenneté et de l’Immigration* [1995] 89 F.T.R 94 (TD) Canada Federal Court, Trial Division.

¹³⁹ *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 S.C.R. 593, Canada: Supreme Court, 71.

¹⁴⁰ Ibid at [69].

¹⁴¹ Immigration and Refugee Protection Act S.C. 2001, c 27, 97(1).

¹⁴² Ibid 97(1) a.

noteworthy that this statutory definition explicitly made reference to international human rights standards in order to designate people in ‘need of international protection’. Therefore, it further strengthens the view adopted by some judges, namely that international human rights could constitute relevant interpretive benchmarks in asylum cases.

Further encouraging this tendency, Section 3 of the IRPA also relied on international human rights by defining the ‘objectives’ of Canadian refugee policy. For instance, Section 3(2) states that ‘the objectives of this Act with respect to refugees are [...] b- to fulfil Canada’s international legal obligations [...]’ and Section 3(3) states that ‘this Act is to be construed and applied in a manner that [...] (f) complies with international human rights instruments to which Canada is signatory’. In light of this regulation, Simeon observed that ‘the overall context in which decisions about refugee protection are made in Canada is circumscribed by direct and explicit reference to human rights instruments of domestic and international origin’.¹⁴³

In spite of the express recognition of the importance of basic human rights in the legislation, Canadian judges have only sporadically relied on international human rights norms for interpreting the notion of persecution in recent years. Although references were made to international human rights in some cases,¹⁴⁴ it seems that the jurisprudence had more recently started to interpret the notion of persecution on an ad hoc basis, without referring to any particular benchmark.¹⁴⁵ For instance, in *Mohilov and Others*, the court stated that with respect to the punishment imposed for refusing to serve in the military ‘the possibility of imprisonment for a period of up to 56 days does not constitute excessive or draconian punishment or persecution’.¹⁴⁶ There

¹⁴³ Simeon (n 132) 96-97.

¹⁴⁴ *Steven Wynn Kubby, Michele Renee Kubby, Brooke Kona Kubby, Crystal Bay Kubby* [2003] VA2-01374; VA2-01722; VA2-01723; VA2-01724, Canada: Immigration and Refugee Board of Canada at [231].

¹⁴⁵ *Canada (Minister of Citizenship and Immigration) v Viljanac and Others* [2014] FC 276 2, Canada: Federal Court: the Federal Court considered that the Board’s decisions that the series of discriminations faced the applicant’s son was unsubstantiated but did not provide any specific framework of analysis. See also: *X v Canada* [2012] VB0-04912, Canada: Immigration and Refugee Board of Canada at [14] and [15].

¹⁴⁶ *Mohilov and Others v Minister for Citizenship and Immigration* [2008] FC 1292 Canada: Federal Court.

was, however, no explanation as to why 56 days of prison did not constitute excessive punishment for this specific individual. The court did not refer to a human rights narrative, nor did it engage in a broader analysis of the personal circumstances of the claimant for assessing the impact of the harm faced. As such, no clear line of interpretation seemed to have been adopted in this case. Conversely, in another decision, *X v. Canada*, the Immigration and Refugee Board of Canada assessed the notion of persecution in light of human rights but did not follow any clear framework of interpretation. The Board stated that ‘being coerced into a religious behavior that is against one’s conscience amounts to a violation of one’s human rights’¹⁴⁷ but no further explanation was provided to assess the consequences that the said measures had on the applicant.

Through a comprehensive study of the Canadian jurisprudence, Meili noted that references to human rights treaties in the Canadian case law have in fact started declining at the end of the 1990s.¹⁴⁸ According to him, ‘only 11.3 per cent of published RPD [Refugee Protection Division] and Federal Court decisions since 1990 contained either direct or indirect references’ to one of the six major international human rights treaties considered in the study.¹⁴⁹ Meili then observed that, although ‘the legislation [should] be interpreted in a manner consistent with Canada’s human rights treaty obligations, [...] human rights treaties have had seemingly little impact on refugee jurisprudence’.¹⁵⁰ He calls this phenomenon the ‘Canadian contradiction’¹⁵¹ and attributes it to diverse factors such as the fact that lawyers are not necessarily human rights experts,¹⁵² that judges seem to suffer from a form of human rights fatigue,¹⁵³ and that human rights standards are so widely accepted in the legal system of the country that judges do not feel the need to express direct references to international treaties.¹⁵⁴

¹⁴⁷ *X v Canada* [2012] *VB0-04912*, Canada: Immigration and Refugee Board of Canada at [9].

¹⁴⁸ Stephen Meili, ‘When Do Human Rights Treaties Help Asylum Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990’ [2014] 51 *Osgoode Hall Law Journal* 627, 630.

¹⁴⁹ *Ibid.*, 647.

¹⁵⁰ *Ibid.*, 629.

¹⁵¹ *Ibid.*, 636.

¹⁵² *Ibid.*, 648.

¹⁵³ *Ibid.*, 650.

¹⁵⁴ *Ibid.* 651.

Although the Canadian jurisprudence had tended to use human rights as interpretive benchmarks in the past, it seems indeed that such references have significantly decreased in recent years. From a different standpoint, Zinn and Perryman observed that higher instance courts have tended to refer more widely to human rights enshrined in the Charter than lower courts. To substantiate their findings, they provided examples of cases involving claims of religious persecution whereby the courts referred to freedom of religion as enshrined in the Charter.¹⁵⁵ They concluded that ‘the judiciary’s supervision of the Convention has been more significantly influenced by changes in Canada’s domestic human rights laws’,¹⁵⁶ thus demonstrating the significant impact that domestic human rights law had on the evolution of the Canadian jurisprudence. Whilst this is certainly true, it is, however, of note that Canadian judges have generally departed from a basic human rights narrative without relying on any other clear methodology, thus failing to adopt an explicit line of interpretation. References to other models, such as the UNHCR approach to persecution have also been quite sporadic even though the UNHCR guidelines have at times been quoted as interpretive guidance in relation to various others topics.¹⁵⁷

Given the overall lack of a principled approach in the Canadian jurisprudence, it is difficult to define a clear practice as to the interpretation of the notion of persecution, although it appears that human rights have to a certain extent underpinned the development of the jurisprudence. It seems, however, that cases are generally adjudicated more on an ad hoc basis, with a risk of inconsistent interpretations.

¹⁵⁵ Russel Zinn and Benjamin Perryman, ‘The Impact of International Law and Domestic Human Rights Law on Canada’s Judicial Supervision of the 1951 Refugee Convention’ (April 21, 2016) in James C. Simeon (eds), *The UNHCR and the Supervision of International Refugee Law* (CUP 2013) 123-147, 141.

¹⁵⁶ Ibid 145.

¹⁵⁷ Inter Alia, *Banegas v Canada (Minister of Citizenship and Immigration)* [2015] FC 45 Canada: Federal Court; *Canada (Minister of Citizenship and Immigration) v A049* [2014] FC 344 Canada: Federal Court; *Ivaraththinam v Canada (Minister of Citizenship and Immigration)* [2014] FC 162 Canada: Federal Court.

D) United States: a subjective approach to the notion of persecution?

In 1980, the USA incorporated the provisions of the 1951 Convention into national law through the Refugee Act¹⁵⁸ but never defined the notion of persecution in the legislation. The interpretation of the notion of persecution therefore has remained merely a jurisprudential construct, without a clear line of interpretation, as regretted by some authors.¹⁵⁹

In order to understand the geopolitical context in which this jurisprudence has evolved, consideration should be given to the role of the USA on the international scene in the first years of the Cold War. After the signature of the 1951 Convention, the USA started distancing themselves from the international human rights movement by refusing to sign and ratify a number of human rights treaties. In this sense, Henkin noted in the late 1970s that, the USA had ‘adhered to hardly any international human rights agreements’ and had signed the UDHR only because it did not have ‘the status of law or international obligation’.¹⁶⁰ As a result, asylum judges in the USA had little incentive to refer to international standards in their decisions. They instead adopted a case-by-case approach to the notion of persecution, based on the subjective evaluation of the judge. According to Hathaway, the American jurisprudence represented at that time, ‘the zenith of a

¹⁵⁸ Refugee Act of 1980, 17 Mar. 1980, Pub L No. 96-212, 94 Stat 102 (1980).

¹⁵⁹ Inter Alia, Deborah E. Anker ‘Determining Asylum Claims in the United States: an Empirical Case Study: The Implementation of Legal Norms in an Unstructured Adjudicatory Environment, Executive Summary January ‘1990, Final Report, April 1991, RSP Documentation Center: 20, regarding inconsistent jurisprudential approaches of the various terms of the refugee definition, including persecution. See also Alexander Aleinikoff, ‘The Meaning of “Persecution” in United States Asylum Law’ [1991] 3 *International Journal of Refugee Law* 5. On variable approaches to the notion of persecution regarding specific caseloads: see Calvin C. Cheung, ‘Protecting Sex Trafficking Victims: Establishing the Persecution Element’ [2007] 14 *Asian American Law Journal* 31. Amy Kretkowski, ‘Continuing Persecution: An Argument for Doctrinal Codification in Light of *In re A-T-and Brand X*’ [2008] 94 *Iowa Law Review* 331, 369: In this article, Kretkowski highlighted the inconsistencies in the jurisprudence on the interpretation of persecution with regards to FGM and the notion of ‘continuing persecution’. Christian A. Fundo ‘Toward a More Individualized Assessment of Changed Country Conditions of Kosovar Asylum- Seekers’ [2010] 43 *Cornell International Law Journal* 611, 620. Fatma Marouf, ‘The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm’ [2011] 22 *Columbia Journal Gender and Law* 81, 90-91.

¹⁶⁰ Louis Henkin, ‘Rights: American and Human’ [1979] 79 *Columbia Law Review* 405, 421.

fundamentally subjective approach to the identification of persecutory harm',¹⁶¹ leading to very inconsistent decisions.

For instance, in 1985, the Board of Immigration Appeals (BIA) stated in *Matter of Acosta* that persecution:

‘was construed to mean either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive [...] The harm or suffering inflicted could consist of confinement or torture. [...] It also could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual’s life or freedom’.¹⁶²

While this definition was relatively broad, it was also quite vague and did not provide for a clear line of analysis. In another seminal decision, *Matter of Kasinga*, the BIA provided an entirely different definition of the notion of persecution without referring to any interpretive framework, let alone human rights standards. The BIA stated that ‘persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim’.¹⁶³ The BIA here seemed to flesh out the discriminatory element underlying the notion of persecution, but remained again very general, thus failing to adopt a clear methodology of interpretation.

Conversely to the above decisions, some early cases were marked by a more restrictive understanding of persecution, as numerous judges considered that the Convention grounds were inherent to the definition of persecution.¹⁶⁴ Aleinikoff criticised this view, stating that adjudicators adopted ‘narrow and technical readings of the specified grounds for persecution, once an applicant has demonstrated that, in fact, he or she is

¹⁶¹ James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, (2nd edn, CUP 2014) 187.

¹⁶² *Matter of Acosta*, 19 I&N Dec 211, 232 (Board of Immigration Appeal 1985).

¹⁶³ *Matter of Kasinga*, 21 I&N Dec 357, 365 (Board of Immigration Appeal 1996).

¹⁶⁴ Aleinikoff (n 159) 10.

likely to be persecuted if returned home'.¹⁶⁵ Unfortunately, this position seems to have later prevailed in some recent cases.¹⁶⁶ This was further inconsistent with other decisions that relied on the broader notion of discrimination, rather than on the five Convention grounds to define persecution. For instance, in one early case, the BIA considered that persecution was the 'oppression which is inflicted on groups of individuals because of a difference that the persecutor will not tolerate'.¹⁶⁷ In another decision, the BIA gave another formulation, stating that persecution was the 'harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome'.¹⁶⁸ Overall, it appeared that the US jurisprudence did not follow a consistent approach for assessing the notion of persecution.

Unfortunately, this lack of consistency has prevailed today. For instance, in *Nagoulko v INS*, the court adopted a very subjective view of what amounts to persecution by stating that it consists in 'the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive'.¹⁶⁹ In some other decisions, adjudicators followed a similar line of analysis as they assessed persecution from their own standpoint rather than in consideration of the particular circumstances of the applicant. In particular, in *Begzatowski v INS*, the court considered that persecution amounted to acts 'that this country does not recognize as legitimate'.¹⁷⁰ In another case, the judges used a different methodology by characterising persecution as meaning 'more than plain harassment and may arise from actions such as detention, arrest, interrogation, prosecution, imprisonment,

¹⁶⁵ Ibid.

¹⁶⁶ *Cambara-Cambara v Lynch, Attorney General*, No. 15-1916, No 15-1917 (United States Court of Appeals for the Eighth Circuit 2016) 'The [applicant for asylum or withholding of removal] bears the burden of showing that his membership in a particular social group was or will be a central reason for his persecution'. See also *Matter of W-G-R-*, 26 I & N Dec 208, 224 (Board of Immigration Appeal 2012), citing 8 USC § 1158(b)(1)(B)(i). *Hernandez-Lima v Lynch, Attorney General*, No 15-1983 (United States Court of Appeals for the First Circuit 2016) at [11].

¹⁶⁷ *Adela Hernandez-Ortiz v Immigration and Naturalization Service*, F.2d 509 (United States Court of Appeals, Ninth Circuit 777 1985) at [20] quoted in Jean-Francois Durieux, 'Three Asylum Paradigms' [2013] 20 International Journal on Minority and Group Rights 147, 157.

¹⁶⁸ *Kretkowski* (n 159) 338: *In re Acosta*, 19 I & N Dec 211, 211-12 (BIA 1985). In 2006, the BIA reaffirmed *Acosta* in *Re C-A-*, 23 I & N Dec 951, 955 (Board of Immigration Appeal 2006).

¹⁶⁹ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 37.

¹⁷⁰ *Begzatowski v Immigration and Naturalization Service*, No 01-2225 (United States Court of Appeals for the Seventh Circuit 2002).

illegal searches, confiscation of property, surveillance, beatings, or torture'.¹⁷¹ In *Matter of M-F-W*, the BIA gave yet another definition of persecution by stating that 'persecution involves significant suffering or harm because of a protected ground in the Act' and should not cause 'merely harassment or discomfort'.¹⁷²

Not only did the above proposed definitions differ in nature, but they are also quite imprecise. As such, in the absence of a coherent framework, the approaches adopted by US judges have tended to vary. Confirming this view, in *Aldana Ramos v Holder*¹⁷³, the Court of Appeal emphasised the ad hoc nature of the approach adopted by US judges by noting that 'whether a set of experiences rises to the level of persecution is decided on a case-by-case basis'.¹⁷⁴

Vittor and Anker considered that this lack of a principled approach led decision makers to be, at times, 'cautious and conservative'.¹⁷⁵ However, the authors pointed out that international human rights have, to a certain extent, influenced the evolution of the US jurisprudence, thus providing some form of guidance to define what sorts of harm amounted to persecution. For instance, they observed that human rights have become a central and integral part of the training of decision makers.¹⁷⁶ Indeed, the official training manual for the officers of the Asylum Office provides basic courses in human rights and encourages the officers to consider human rights violations when they determine what forms of harm amount to persecution.¹⁷⁷

¹⁷¹ *Tesfu v Ashcroft*, 322 F.3d 477, 481 (7th Circuit Court 2003).

¹⁷² *Matter of M-F-W- & L-G-*, 24 I&N Dec 633 (Board of Immigration Appeal 2008).

¹⁷³ See other cases where the assessment of the notion of persecution was based on a rather subjective test, without reference to any clear benchmarks: *Hernandez-Lima v Lynch, Attorney General*, No.15-1983, United States Court of Appeals for the First Circuit, 7 September 2016, 10: the threats received by an applicant did not amount to persecution because they were not 'sufficiently menacing' as they did not involve any physical harm. *Matter of Z-Z-O-*, 26 I&N Dec. 586 (Board of Immigration Appeal 2015) at 589: Economic sanctions and threat to be forcibly sterilized did not amount to persecution in this case, but the board did not further explain why.

¹⁷⁴ *Aldana Ramos v Holder*, 13-2022, 57 F 3d 9, 15 (1st Circuit Court 2014) 13.

¹⁷⁵ Deborah Anker and Josh Vittor, 'International Human Rights and US Refugee Law: Synergies and Contradictions' in Burson Bruce and David James Cantor (eds), *Human Rights and the Refugee Definition, Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 109-137, 121.

¹⁷⁶ *Ibid* 110.

¹⁷⁷ *Ibid* 116.

In addition, Anker demonstrated that human rights activists have contributed to the development of human rights in the US jurisprudence. According to her, the human rights narrative has progressively gained influence in the decisions of the BIA, allowing for a broader acceptance of different forms of harm. In particular, Anker studied how gender-based asylum claims have been historically adjudicated¹⁷⁸ in the US and explained that through the human rights advocacy of different stakeholders, gender-based forms of violence have been increasingly accepted by decision makers. Anker and Vittor also noted that the UNHCR guidelines had a major importance in the development of the case law in the US.¹⁷⁹ Whilst they only considered that the UNHCR's normative activity was part of the wider human rights movement, it should be also noted that the UNHCR Handbook has departed from a strict human rights narrative for interpreting persecution and encouraged a more circumstantial approach, which has also been referred to in the American jurisprudence.¹⁸⁰ As such, it appears that both the basic human rights paradigm and the interpretive narrative of the UNHCR Handbook have underpinned, to some extent, the development of the case law in the US.

Although no clear interpretive methodology has been developed in the American jurisprudence, it can be generally observed that the judges have, in some cases, interpreted the notion of persecution in an evolutionary manner, by recognising that various forms of harm could warrant refugee status. For instance, Vittor and Anker noted that US courts have recognised the existence of emotional harm,¹⁸¹ economic harm,¹⁸² denial of property¹⁸³ and denial of health care¹⁸⁴ as new types of predicaments amounting to persecution. Such conclusions either relied on a holistic assessment of the circumstances of the

¹⁷⁸ Deborah Anker, 'Legal change from the bottom up: The development of gender asylum jurisprudence in the United States', Chapter 2 in Efrat Arbel, Catherin Dauvergne, Jenni Millbank (eds) *Gender in Refugee Law- from the Margins to the Centre* (Routledge 2014) 46-72, 48.

¹⁷⁹ Anker and Vittor, (n 175) 119.

¹⁸⁰ Inter alia, *Fengchu Chang v Immigration and Naturalization Service*, 96-3140 (United States Court of Appeals for the Third Circuit 1997). *Hongke Zhang v John Ashcroft, Attorney General*, 03-70930 (United States Court of Appeals for the Ninth Circuit 2004). *Bringas-Rodriguez v Session, Attorney General*, 13-72682 (United States Court of Appeals for the Ninth Circuit, 8 March 2017) 17.

¹⁸¹ Anker and Vittor (n 175) 126.

¹⁸² Ibid 132.

¹⁸³ Ibid 133.

¹⁸⁴ Ibid 134.

applicants or on ad hoc references to external human rights standards without a clear framework of interpretation. For instance, in *Matter of T-Z*, the court noted that there may be situations in which ‘an extraordinarily severe fine or wholesale seizure of assets may be so severe as to amount to persecution even though the basic necessities of life might still be attainable’,¹⁸⁵ thus adopting a rather broad understanding of the notion of persecution. Conversely, in *Chen v Holder*, the court assessed diverse human rights violations compounded by a series of other restrictions in order to conclude that ‘a claim of persecution based on economic deprivation generally requires a showing of a deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life’,¹⁸⁶ therefore adopting a stricter view of what sorts of harm amount to persecution.

Without the clear use of a defined framework for interpreting the notion, there remains a certain risk of uncertainty and lack of transparency in the adjudication of asylum claims lodged in the US. Indeed, a 2007 study of the jurisprudence conducted by Schoenholtz et al. confirmed this view by demonstrating that there were significant disparities between the different American courts adjudicating cases, which led them to call the asylum system in the US, a ‘refugee roulette’.¹⁸⁷ Recent findings made by the appeal court are quite telling in that regard and indicate that their observations remain relevant today. In *Pan v. Holder*, the court reviewed the appeal claim of a Christian male of Korean ethnicity originating from Kyrgyzstan who recounted a series of incidents whereby he and his family were mistreated by some non-state actors due to their religion. At first instance, the BIA rejected his claim on the ground that the harm faced did not amount to persecution but the BIA did not provide a clear explanation. The Appeal Court granted the claimant’s petition for review considering that the Board had failed to explain why his past experiences were ‘insufficiently egregious to constitute

¹⁸⁵ In *Re T-Z*, Respondent 24 I&N Dec 163 (Board of Immigration Appeal 2007) Interim Decision #3564, 171.

¹⁸⁶ *Chen v. Holder*, Attorney General of the United States, Bo. 08-2836 (United States Court of Appeals for the Seventh Circuit 2010) 16.

¹⁸⁷ Andrew I. Schoenholtz, Jaya Ramji-Nogales, Philip G. Schrag ‘Refugee Roulette: Disparities in Asylum Adjudication’ [2007] 60 Stanford Law Review 295, 379: For these authors, the lack of statutory definition for the notion of persecution is not necessarily the cause of discrepant interpretations. They impute it instead to other circumstantial factors in refugee procedures.

persecution’,¹⁸⁸ pointing at the necessity to better substantiate the assessment of what forms of harm amount to persecution and why. This assessment is regrettably often absent in many decisions in the USA.

In conclusion, American judges do not explicitly rely on any clear methodology to interpret the notion of persecution. However, as demonstrated above, international human rights law and UNHCR guidance have, at times, guided the evolution of the jurisprudence in such a manner that various forms of harm are nowadays considered to amount to persecution, although the threshold of persecution remains unclear. Even when human rights standards have been referred to in various cases, in the absence of a specific interpretive pattern, there is still a risk that decision makers will adopt inconsistent or arbitrary methodologies for interpreting persecution.

Part 3- Concluding remarks

An overview of the above jurisprudences has demonstrated that there is still a significant level of inconsistency in interpreting what forms of harm amount to persecution, thus leading to some legal uncertainty for asylum seekers and questioning the relevance of this notion in certain cases. This tendency is noticeable, not only between national jurisdictions but also within them. Whilst common-law countries, save for the USA, have tended to refer more often to human rights for interpreting persecution, civil-law countries, such as France and Belgium, have been more reserved, even after the QD officially endorsed a human rights approach in Europe. Although a certain influence of international human rights is discernable in these countries, in particular through express references made to the QD, it remains quite unclear how human rights have underpinned the evolution of the case law in these jurisdictions. As such, ad hoc approaches are still quite dominant, thus creating some form of legal uncertainty for asylum seekers. The timid adoption of a more circumstantial approach has, however, yielded more generous results in Belgium than in France.

¹⁸⁸ *Pan v. Holder, Attorney General*, No 13-203 (2d Circuit Court 2015).

In countries that have referred more often and explicitly to human rights, such as in the UK, New Zealand and Australia, it does not appear that this narrative has fostered more consistency in the jurisprudence. Although a certain influence of the model developed by Hathaway is noticeable, decision makers seemed to have variably applied the parameters of his framework. In the words of Cantor, the human rights paradigm has proven to be ‘not cohesive’ but has rather reflected ‘a number of divergent understandings of the role of human rights in the interpretive exercise’¹⁸⁹ of various jurisdictions. As such, the human rights approach based on objective standards of interpretation has not really fulfilled its promise of encouraging more coherence in the application of the 1951 Convention in the 21st century. Other countries, such as Canada and the USA have followed their own evolution with a certain influence of human rights law but there are still divergent views on how to assess the notion of persecution in the jurisprudence of these jurisdictions.

Whilst the human rights framework has not been applied consistently, it does not appear that national jurisprudences have scrupulously developed or followed alternative models. The UNHCR’s circumstantial approach has been quite irregularly relied upon, although as noted above, it seems to have been quite welcomed in practice in Belgium and, to a certain extent, in New Zealand. In general, decision makers have been careful when referring to the UNHCR provisions. This could be explained by the fact that such guidance is not binding on states. Indeed, according to Feller, ‘judges may be reluctant to embrace standards that have no clear legal authority in their national laws’.¹⁹⁰ This statement is also true for international human rights models, in particular in dualist legal systems. It seems, however, that this concern is more meaningful in the case of interpretive frameworks based on soft law

¹⁸⁹ James Cantor, ‘Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm’ in Burson Bruce and David James Cantor (eds), *Human Rights and the Refugee Definition Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 349-395, 379.

¹⁹⁰ UNHCR, Address by Ms Erika Feller, Director, Department of International Protection, on the occasion of the 4th International Conference of the International Association of Refugee Law Judges (Berne, 25 October 2000).

instruments, such as UNHCR documents, as decision makers might want to avoid ‘any impression of judicial law-making’.¹⁹¹

In 1999, Carlier noted that, according to the results of a comparative analysis of the jurisprudence in 15 countries, the ‘reasoning for decisions relating to refugee status is poor or non-existent’. He pointed that ‘too often, the grounds for a decision to recognise or reject refugee status, if given at all, are limited to general considerations’.¹⁹² Almost 20 years later, progress has been made, but significant discrepancies are still noted in the approaches used to interpret the notion of persecution. It could be, therefore, argued that some jurisprudential harmonisation is still needed between countries in order to ensure more coherence of the international system of refugee law. Harmonisation could be achieved notably through a broader recognition of the normative value of UNHCR guidance. Indeed, as proposed in the UNHCR Handbook, the application of an interpretive framework based on objective standards such as human rights norms, compounded by more practical approaches, is desirable in order to adopt interpretive schemes that are more consistent and better in line with the current protection needs of refugees. For instance, the jurisprudence developed in New Zealand demonstrated that the human rights framework can be used as a guiding principle to assist the analysis of the notion of persecution but not as a rigid framework. Indeed, in New Zealand, the human rights framework is often complemented by practical considerations given to the individual circumstances of asylum seekers and refugees. Although no explicit reference is made to the UNHCR approach, New Zealand judges seem, nonetheless, to adopt, a similar view by using human rights as general guidelines and complementing them with a more circumstantial approach.

The concrete benefits and limitations that diverse interpretive approaches have on certain caseloads will be more closely evaluated in the

¹⁹¹ Ibid.

¹⁹² Jean-Yves Carlier, ‘The Geneva refugee definition and the ‘theory of the three scales’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 37-54, 40.

next chapter in a case study of specific claims based on gender-related persecution.

Chapter 5: Interpreting persecution in the context of gender-related violence

As noted in previous chapters, persecution has traditionally been perceived as a form of harm perpetrated by oppressive regimes against individuals in the public sphere.¹ Consequently, and for a long time, persecution was not considered to encompass private forms of violence suffered by women within their family or their community.² This view, however, progressively changed in the 1980s and 1990s, when an increasing number of women lodged asylum applications based on their fear of violence from non-state agents.³ In this period, domestic jurisdictions started to adjudicate those claims in a more favourable manner, considering that persecution could occur within the private sphere and be specifically directed at women.⁴ In spite of a growing recognition of victims of gender-based violence as refugees, these forms of harm still pose significant interpretive challenges and are inconsistently addressed in domestic jurisdictions. In light of this situation, one might therefore wonder whether the notion of persecution is actually relevant for gender-sensitive claims and which interpretive method is the most desirable in these cases?

¹ See Chapter 1 and the traditional understanding of persecution according to the plenipotentiaries. See also Jane McAdam, “Rethinking the Origins of Persecution” [2014] 25 *International Journal of Refugee Law* 667, 674. McAdam mentioned the early League of Nations instruments indicating that ‘the men would run the risk of all kinds of persecution, while the women, children and old people would succumb to the hardships of the present economic conditions’.

² Jean-Yves Carlier, ‘The Geneva refugee definition and the ‘theory of the three scales’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 37-54, 39.

³ Susan Kneebone, ‘Women Within the Refugee Construct: “Exclusionary Inclusion” in Policy and Practice — the Australian Experience’ [2005] 17 *International Journal of Refugee Law* 7, 9. See also Florian Francois Hoepfner, *L’évolution de la notion de réfugié, Publication de la fondation Marangopoulos pour les droits de l’homme* (Série 18, Paris Pedone 2014) 265. In James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, (2nd edn, CUP 2014) 193 Hathaway observed that, around the same period, refugee movements were “prompted by a risk of harm from persons unconnected to the state, such as insurgent groups, local criminal gangs, or at the hands of members of a family clan, or tribe”. In Walter Kalin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’ [2001] 15 *Georgetown Immigration Law Journal* 415, 432. the author noted that the ‘world-wide decline of State power and the emergence of non-state agents of persecution’ constituted major ‘developments [that] have had the most profound impact on refugee law during the past ten years’.

⁴ Carlier (n 2) 39. For Carlier, this change of paradigm reflected well how the notion of persecution had evolved in the 20th century.

Given the rising proportion of refugee women in the world⁵ and the conceptual difficulties in addressing their claims, the present chapter will engage in a case-study of decisions involving gender-based persecution. Whilst there is no legal definition of gender-related persecution in international law,⁶ the UNHCR defines it broadly as a form of harm that encompasses ‘the range of different claims in which gender is a relevant consideration in the determination of refugee status’.⁷ Gender-based violence covers a great variety of harms, such as, but not limited to, ‘acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals’.⁸ These various types of violence could not be comprehensively addressed in this chapter. However, some of the claims that have been the most regularly lodged in jurisdictions and that have raised contention, will be considered below, namely Female Genital Mutilation (FGM), domestic violence and trafficking in persons (hereunder trafficking) (Part 2).⁹ Prior to this, a theoretical analysis of the nature of gender-based violence will be conducted in order to delineate the contours of the interpretive debate (Part 1).

This chapter will conclude that decision makers tend to overlook some aspects of the violence faced by women, and this, sometimes, leads to restrictive or inadequate outcomes. It will be contended that international

⁵ Numbers vary but, women are consistently represented as constituting at least 50 per cent of the entire refugee population. UNHCR, Women, at <http://www.unhcr.org/women.html>. Kim mentioned estimates reporting that about three quarters of the refugee population are women and children in Sunny Kim, ‘Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law’ [1994] 2 Journal of Gender and the Law 107, 109.

⁶ UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, at [1].

⁷ Ibid at [1].

⁸ Ibid at [3].

⁹ In Kneebone (n 3) 20, the author identified some major categories of gender-related claims including sexual violence, FGM and domestic violence. Anker and Lufkin followed the same line of analysis in Deborah Anker and Paul Lufkin, ‘Gender and the symbiosis between refugee law and human rights law’ (Migration Information Sources 2003) online article available at <https://www.migrationpolicy.org/article/gender-and-symbiosis-between-refugee-law-and-human-rights-law>. See also Heaven Crawley, ‘Engendering International Refugee Protection: Are We There Yet?’ in Burson Bruce and David James Cantor (eds), *Human Rights and the Refugee Definition Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 322-347, 330. The present chapter will roundly adopt the same line of analysis. However, given that the issue of sexual violence is rather broad, this chapter will focus more specifically on one aspect of sexual violence, namely trafficking, due to the conceptual difficulties that these cases raises as it will be analysed below.

human rights law had a positive influence on the adjudication of gender-based claims, but the strict application of a human rights framework has not really encouraged protective and consistent approaches. In particular, the role that human rights should play in interpreting persecution has been inconsistently understood. Additionally, decision makers who have relied on a formalist human rights framework have often focused on stereotyped forms of harm¹⁰ and, therefore, have often disregarded diverse circumstances of refugee women.

Part 1) Gender-based violence and interpretive challenges

The below section will demonstrate that the development of human rights on the international scene has encouraged an evolutionary approach to the notion of persecution as contended by some authors (A). In spite of these changes, it will be argued that interpretive challenges for cases of gender-based harms are still persistent (B).

A) The influence of human rights law on the growing recognition of gender-based violence as a form of persecution

In the second half of the 20th century, states started considering that the condition of women in the private sphere should be regulated through international human rights law. In 1979, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was adopted as members of the international community proclaimed the necessity to bring ‘the female half of humanity into the focus of human rights concerns’¹¹ in order to change ‘the traditional role of men [and] women in the society and in the family’.¹² This new focus on women’s rights arguably influenced international refugee law. Indeed, a few years after the adoption of the

¹⁰ In Megan Denise Smith, ‘Rethinking gender in the international refugee regime’ [2016] 53 FMR 65: the author stated that ‘measures to improve RSD and expand the Convention definition for gender-related persecution have tended to portray ‘essential’ refugee women’s identities that are constructed by UNHCR, the media and governments but not by refugee women themselves. Key to this victimhood narrative are certain images and categories, such as the lumping together of ‘women and children’.

¹¹ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, UNTS 13 Vol 1249, Introduction.

¹² Ibid.

CEDAW, the UNHCR started issuing documents, recommending that the typical predicaments faced by women should also be considered a basis for asylum.¹³ In 1991, the UNHCR then released formal guidelines on the protection of women, stating that a gender-based approach should be adopted for interpreting the terms of the 1951 Convention in cases involving refugee women.¹⁴ These guidelines in turn encouraged Canada, the USA, Australia and the UK to develop their own interpretive guidance for claims based on gender-related persecution.¹⁵

In light of this evolution, some authors pointed out that human rights had exerted a growing influence on the understanding that decision makers had of the notion of persecution. For instance, Anker and Lufkin argued that human rights had a determining impact on the jurisprudence and have led to the recognition of an increasing number of victims of gender-related violence.¹⁶ Kneebone also noted that, even if persecution was traditionally perceived as a form of harm based on ideological differences, the human rights framework positively influenced the way gender-related persecution was interpreted in refugee law.¹⁷ Similarly, Edwards contended that the emergence of specialised treaties had ‘advanced global trends towards gender inclusion and equal treatment between the sexes’, thus leading to more generous approaches to those claims.¹⁸

¹³ In 1985 the UNHCR ExCom stated that: ‘women asylum seekers who fear harsh or inhumane treatment due to their transgressions of societal mores in their home countries’ may fall within the protection regime of the 1951 Convention, UNHCR ExCom conclusion No 39 (XXXVI) – 1985 – Refugee Women and International Protection. Inter alia, see also conclusion defining gender-based violence as a form of persecution; UNHCR ExCom conclusion No 73 (XLIV) – 1993 – Refugee Protection and Sexual Violence; ExCom conclusion No. 77 (XLVI) – 1995; ExCom conclusion No 79 (XLVII) – 1996; ExCom conclusion No 87 (L) – 1999.

¹⁴ UNHCR, Guidelines on the Protection of Refugee Women, July 1991.

¹⁵ Kneebone (n 3) 15.

¹⁶ Anker and Luftin (n 9). See also Deborah Anker, ‘Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States’ in Efrat Arbel, Catherin Dauvergne, Jenni Millbank (eds) *Gender in Refugee Law, From the Margins to the Centre* (Routledge 2014) 46-72, 42. See also: Rachel Bacon and Kate Booth, ‘The Intersection of Refugee Law and Gender: Private Harm and Public Responsibility: Islam; Ex Parte Shah Examined’ [2000] 23 University New South Wales 135, 142: “developments in the international human rights field indicate that a significant shift has taken place in the international community’s understanding of gender issues more generally.”

¹⁷ Kneebone (n 3) 9.

¹⁸ Alice Edwards, ‘Age and gender dimensions in international refugee law’ in Erika Feller, Volker Turk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) 50.

In spite of these positive developments, some other scholars have argued that there were some limitations existing in the refugee definition that could not be overcome even through the application of a human rights scheme. For instance, in the late 1990s, Haines raised a major concern for the recognition of gender-related persecution cases because of the surrogacy principle. For him, the accountability theory applied by certain European countries regarding the role of the state in acts of persecution was an important obstacle to the recognition of women as refugees.¹⁹ According to these countries, a claimant would be granted refugee status only if the state actively encouraged or tolerated the infliction of harm, thus adding an extra burden of proof on women claimants. This practice had been mostly used in civil countries such as France and Germany²⁰ but fortunately has been progressively abandoned since the QD²¹ was adopted and is more rarely relied upon in the recent jurisprudence. Whilst some jurisdictions still tend to reject asylum applications by placing an undue emphasis on the role of state protection,²² the human rights scheme, in particular developed through the QD had in fact helped to partly overcome this issue, at least in Europe. Although state protection has, at times, been considered in other jurisdictions, an extensive discussion of this element would fall outside the purview of the present analysis. Indeed, as discussed in Chapter 3, the test of state protection should not be considered an inherent part of the persecution test. As mentioned, by Kneebone in her analysis of gender-based persecution cases, ‘the true position is that the lack of state protection is relevant to the question of the reasonableness of the fear of persecution, but is not a requirement of persecution as such’.²³ The present section will instead focus on the nature of the harm required to amount to persecution as it has also raised major contentious in a number of decisions.

¹⁹ Rodger Haines, “Gender-Based Persecution: New Zealand Jurisprudence” [1997] 9 *International Journal of Refugee Law* 129, 139.

²⁰ Catherine Phuong, ‘Persecution by Non-State Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention’ [2002] 4 *European Journal of Migration and Law* 521.

²¹ Article 6 of the QD.

²² Hoepfner (n 3) 318 regarding the practice in Canada.

²³ Kneebone (n 3) 39. Similarly, see Hoepfner (n 3) 319 on the view of Canadian jurisprudence.

In addition to concerns related to the role of state protection in asylum claims, some authors have observed that the refugee definition is unable to encompass all forms of violence against women due to the absence of ‘gender’ or ‘sex’ as a Convention ground.²⁴ For them, this omission generally discouraged a gender-sensitive interpretation of the 1951 Convention, and raised concerns regarding the flexibility of the refugee definition and its ability to be interpreted in an evolutionary manner. The UNHCR somehow responded to these arguments by expressing the view that gender-based violence²⁵ could be easily accommodated within the current definition as women could, depending on the circumstances, fall within the Membership to a Particular Social Group (MPSG) ground. National jurisprudences²⁶ generally followed the same view.

Some authors, such as Anker, also supported this position. According to her, there was no need for a ‘gender’ ground to be included within the 1951 Convention because a gender-based approach should be generally applied when interpreting the whole refugee definition.²⁷ She argued that the development of human rights should be viewed as encouraging a gender-based approach to all the Convention reasons, without the necessity to add a specific ground of ‘gender’. In Europe, the recast QD adopted this position by stating that persecution can be of a specific gender-related nature,²⁸ thus further encouraging states to adopt an overall gender-sensitive interpretation of the 1951 Convention without amending the definition of a refugee. This approach is currently the dominant one, given the absence of concrete prospect to amend the Convention. The interpretive difficulty seems,

²⁴ Joanna J. Kallinosis, ‘Refugee Roulette: A Comparative Analysis of Gender-Related Persecution in Asylum Law’ [2017] 6 DePaul Journal of Women, Gender and the Law 55, 90-92. See also Alice Edwards, ‘Distinction, Discretion, Discrimination: The new frontiers of gender-related claims to asylum’ European University Institute, Florence, Italy, 18-19 June 2012, 1-13, 13 available at <http://www.refworld.org/docid/4ffd430c2.html> and Kim (n 5) 108-109 and 113.

²⁵ UNHCR ExCom conclusion No. 39 (XXXVI) – 1985 – Refugee Women and International Protection. UN High Commissioner for Refugees (UNHCR), Guidelines on the Protection of Refugee Women, July 1991, at [72].

²⁶ Inter alia, *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 United Kingdom: House of Lords (Judicial Committee), 25 March 1999; *Minister for Immigration and Multicultural Affairs v Khawar* HCA 14 (11 April 2002); Case No. 0900571, RRTA 303 (16 April 2009); *Matter of A-R-C-G* 26 I&N Dec. 388 (Board of Immigration Appeal 2014);

²⁷ Anker (n 16) 51.

²⁸ Article 9(2)(f) QD.

however, to have been displaced onto the interpretation of the term persecution, rather than the Convention grounds as it will be below demonstrated.

Whilst the influence of human rights has most certainly encouraged an evolutionary understanding of the refugee definition, one might, nonetheless, wonder to what extent this has been the case. In particular, it should be questioned whether human rights have permitted a flexible and adaptable interpretation of the notion of persecution. What follows will highlight some theoretical deficiencies in the human/woman rights narrative in order to assess the limitations that the human rights approach can have in interpreting gender-related forms of persecution.

B) Interpretive challenges

Recent criticisms have been voiced against the gender bias that underpinned the development of basic human rights on the international scene. Authors have pointed to the fact that the international human rights narrative is not neutral but is based on typical male circumstances.²⁹ This paradigm perpetuates the hierarchical subjection of women to men in patriarchal societies and fails to fulfil the liberal promise of human rights to ‘emancipate the individual from the oppression of political structures’.³⁰ In this sense, Crawley noted that the ‘ideas of what constitutes human rights follow an androcentric model’ which posits males’ experiences as the norm and presents women as helpless victims.³¹ In a similar manner, Edwards considered that, although the recent development of women’s rights on the international scene was a positive step towards a more inclusive and gender-sensitive approach to refugee claims, the human rights paradigm unfortunately remains anchored into the traditional dichotomy between men and women. According to her, ‘men’s experiences are posited as the norm of

²⁹ Inter alia see Charlesworth et al, *ibid*; C. Kim (n 5); C. Romany, ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ (1993) 6 *Harvard Human Rights Journal* 87, 87; Crawley (n 10) 339; Crawley speaks of the ‘gendered nature of IHRL’.

³⁰ Romany *ibid* 90.

³¹ Crawley (n 10) 341. See also Alice Edwards, ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy [2010] 29 *Refugee Survey Quarterly* 21, 31.

international law and women only gain access to the system by equating their experiences to these masculine norms'.³² In order to illustrate her statements, she provided the example of the prohibition of torture, which is still perceived as an act perpetrated by state actors, or individuals in positions of state authority, for the purpose of extracting information. She explained that these experiences usually relate to men's roles in the society more than women's³³ and that the violence against women has to reach a certain threshold of gravity in order to be considered torture, thus adding an extra burden on women to demonstrate that they have been victims of severe human rights violations. This view has been supported by many authors such as Crawley³⁴ or Firth and Mauthe who also lamented that 'women have to conform to a particular cultural stereotype in order to succeed in their asylum claims'.³⁵ On a similar note, Smith noted that in order to 'gain state protection, a woman must demonstrate that she behaves in the proper way [...] that is, as a de-politicised, voiceless victim of an oppressive culture',³⁶ thus further highlighting the gender-biased interpretations of the refugee definition.

Authors argued that one of the major reasons for the dysfunctionality of the human rights and asylum systems is the separation between public and private spheres that is operated in international human rights law.³⁷ Females' experiences are typically perceived to unfold in the private sphere, while males continue to be major actors of the public sphere. For Edwards, this distinction engages a limited requirement of the state to protect individuals in the private sphere which is inadequate in certain refugee claims.³⁸ Robert also noted that this distinction between the private and public sphere is misleading because it creates the wrong assumption that harms perpetrated in the private

³² Alice Edwards, *Violence against women under international human rights law*, (CUP 2010) 305.

³³ Ibid 206.

³⁴ Crawley (n 10) 323.

³⁵ Georgina Firth and Barbara Mauthe, 'Refugee Law, Gender and the Concept of Personhood' [2013] 25 *International Journal of Refugee Law* 470, 482.

³⁶ Megan Denise Smith, 'Rethinking gender in the international refugee regime' [2016] 53 *FMR* 65, 66.

³⁷ Edwards (n 32) 237. See also inter alia, Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' [1990] 12 *Human Rights Quarterly* 486; for a general discussion on the distinction between private/public sphere or state/civil society see: Frances E. Olsen, 'International Law: Feminist Critiques of the Public/Private Distinction' [1993] 25 *Studies in Transnational Legal Policy* 157. For a general overview of the debate: Tuuli Karjala, *Sixty Years of Silence: Gender Discrimination under International Refugee Law* (Stellenbosch University, 2016-03) 65.

³⁸ Ibid 238-239.

sphere are only motivated by personal reasons.³⁹ Similarly, Firth and Mauthe⁴⁰ pointed out that human rights offer a narrow view of women's experiences because the traditional distinction between public/private harms⁴¹ has an adverse impact on the way asylum applications are adjudicated. According to them, 'there is little space within the dominant discourses for context-specific, accurate representations of refugee women's diverse experiences or agency'.⁴²

A feminist approach to international human rights law, therefore, shows that the current human rights paradigm for interpreting persecution does not adopt a neutral language. It highlights the fact that human rights law is based on behavioural standards rooted in men's daily experiences within the public sphere and does not adequately reflect the complexity of women's circumstances, pictured as having protection needs mostly within the private sphere. Whilst the private aspect of women's experiences should not be denied, a larger understanding of the public dimension of the violence that they face, and how their roles are shaped by traditional structures of societies, would encourage a more holistic understanding of the nature of gender-based persecution. In fact, the basic human rights narrative runs the risk of simplifying the interpretive exercise of the notion of persecution by identifying only certain forms of harm and overshadowing others. This view is in line with the oft quoted observations of Charlesworth, Chinkin and Wright who stated that 'the normative structure of international law has allowed issues of particular concern to women to be either ignored or undermined'.⁴³

For example, it is nowadays well established that gender violence such as sexual abuse or rape⁴⁴ constitutes a human rights violation. However,

³⁹ Anthea Roberts, 'Gender and Refugee Law' [2002] 22 Australian Year Book of International Law 159, 190.

⁴⁰ Firth and Barbara Mauthe (n 35) 481.

⁴¹ Ibid 476. Anker also pointed out that some judges adopted the same view, in Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' [2002] 15 Harvard Human Rights Journal 133.

⁴² Firth and Mauthe (n 35) 482.

⁴³ Hilary Charlesworth, Christine Chinkin, Shelley Wright, 'Feminist Approaches to International Law' [1991] 85 American Journal of International Law 613, 625.

⁴⁴ Anker (n 41) 141-144.

other aspects of a victim's life are barely touched upon by human rights or refugee law. On this point, reference can be made to Liberman who highlighted the importance of the notion of shame, as structuring the roles of men and women in certain societies.⁴⁵ She described the major implications that this element can have on the safety of women as she stated that:

‘in numerous cultures if a woman is raped or subjected to spousal abuse and she tries to seek redress, her family and community may ostracize her and treat her as ruined property, unworthy of remarriage. By the same token, the alternative for a woman who refuses FGM is ostracisation, shame, and derision as either a promiscuous woman, or an inadequate, overgrown child’.⁴⁶

In spite of this, the element of shame, underlying the acts of gender-related persecution, is rarely acknowledged as a form of violence, let alone a form of persecution in asylum jurisdictions. It is, nonetheless, a powerful tool by which perpetrators keep women in a subversive position in certain social settings.

For instance, a victim of rape, in the context of indiscriminate criminal violence might be unlikely to face the same form of abuse if she goes back to her country. It should not, however, be concluded that she is not at risk of harm upon return. Focusing only on the prospective risk of human rights violation (the rape) would displace the discursive debate onto the wrong form of predicament. The harm that the victim might suffer if she goes back to her community, could be very much attached to the ‘shame’ that the rape has bestowed upon the family, leading in the worst cases to honor killings, but also to various forms of ostracism, stigma and trauma that can have in turn a major impact on the individual's life. Whilst this aspect of gender-based

⁴⁵ Irena Liberman, ‘Women and Girls Facing Gender-Based Violence, and Asylum Jurisprudence’ [2002] 29 Online Human Rights Magazine of the American Bar, no 3 available at: https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home.html.

⁴⁶ Ibid.

violence is increasingly discussed in national jurisdictions, it remains too often forgotten.

For the reasons laid out above, it appears that a human rights framework for interpreting the notion of persecution does not sufficiently encourage a holistic assessment of the various circumstances that refugee women could face in their place of origin, which appears in fact in opposition to the arguable intention⁴⁷ of the plenipotentiaries to allow for an evolutionary understanding of the notion of persecution.

With this theoretical background in mind, the following section will engage in a study of selected cases in order to evaluate how the harms claimed by women have been addressed in various jurisdictions and what evolutions are further desirable.

Part 2) The notion of persecution and jurisprudential approaches to gender-based violence

Certain forms of violence perpetrated in the refugee's community or family, such as FGM (A) coupled with/or domestic violence (B) have formed the basis of numerous refugee claims. Similarly, criminal activities, perpetrated by transnational networks forcing people into trafficking have been increasingly invoked in domestic jurisdictions (C). Although men can be trafficked under various circumstances, a very large number of the trafficking victims are women and girls,⁴⁸ therefore falling within the category of gender-related violence.⁴⁹ The above harms are only few examples of the forms that gender-based violence can take but they have been adjudicated quite inconsistently, thus raising some legal uncertainty for asylum seekers. This section will analyse how the notion of persecution has

⁴⁷ Chapter 1, Part 2 (C).

⁴⁸ Report of the General Assembly on Trafficking in women and girls A/71/223, 27 July 2016 at [9]. See Saito Kaori, Research Paper No 149, 'International protection for trafficked persons and those who fear being trafficked' Policy Officer Division of Human Resource Management UNHCR, December 2007, Geneva, 9.

⁴⁹ UNHCR Guidelines on International Protection No7: The Application of Article 1A(2) of the 1951 Convention and Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07 at [21].

been applied to such claims and argue that this notion remains relevant for these specific cases if a more circumstantial approach is adopted.

A) The practice of FGM and its persecutory dimension

i-FGM: a general overview

According to the World Health Organization (WHO), FGM consists in ‘all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, for non-medical reasons’.⁵⁰ Due to the severe medical complications and suffering imposed by the act of FGM, the WHO considers that ‘FGM is a violation of the human rights of girls and women’.⁵¹ The practice of FGM is a ritual performed in certain traditional societies in order to mark the passage from childhood to adulthood, and often takes place in the traditional context of arranged or forced marriage. Middleburg and Bala pointed out that FGM is generally ‘believed to be a requirement for marriage and necessary to control women’s sexuality’.⁵² Lewis also highlighted the traditional aspect of FGM by explaining how it structures the role of women within their community.⁵³ This deep customary imprint and the private dimension of FGM has been viewed by some as a major barrier to the recognition of FGM victims as refugees.⁵⁴ For instance, Steinbock rejected the possibility that FGM could be a basis for asylum as he considered that the 1951 Convention was not meant to provide protection against such forms of harms. For him, it was ‘hard to justify the application of the refugee definition to this traditional practice of many

⁵⁰ WHO, ‘Eliminating Female Genital Mutilation: An Interagency Statement’ (2008) 4; WHO, ‘Female Genital Mutilation’, Fact Sheet No 241 (Feb 2014) <<http://www.who.int/mediacentre/factsheets/fs241/en/>>.

⁵¹ ‘Female Genital Mutilation’, Fact Sheet No 241 (updated Feb 2017) <<http://www.who.int/mediacentre/factsheets/fs241/en/>>.

⁵² Annemarie Middelburg, Aline Balta, ‘Female Genital Mutilation/Cutting as a Ground for Asylum in Europe’ [2016] 28 International Journal of Refugee Law 416, 416-417.

⁵³ In Hope Lewis, ‘Between *Irua* and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide’ [1995] 8 Harvard Human Rights Journal 1, 30, the authors mention the analysis of Jomo Kenyatta who calls for awareness of the cultural context of FGM. Although caution should be exerted in relying on cultural relativism arguments to justify FGM, the view that FGM is deeply rooted into social structures, is important.

⁵⁴ Ibid 8. Lewis mentioned that considering FGM has raised ‘complex cultural, gender, and racial questions’ and thus is not easily considered a human rights violation.

centuries' standing based on the historical background of the Convention',⁵⁵ because he considered that there was 'no evidence whatsoever that the drafters or practitioners of refugee law in the post-war period intended to encompass known, traditional, gender-based inequalities'.⁵⁶ His view, however, did not gain major traction amongst decision-makers and scholars as FGM became a central concern of refugee women towards the end of the cold war.

ii- FGM as a physical harm: an act of persecution?

As of the 1990s,⁵⁷ an increasing number of claims relating to the fear of being subjected to FGM started being lodged in national jurisdictions. This period coincided with the growing influence of the human rights approach proposed by Hathaway, which arguably had a certain impact on the adjudication of these cases. This evolution led to a growing acceptance that a risk of FGM, due to the extreme suffering that it entails, could amount to persecution. For instance, as early as 1994, Canada acknowledged that a risk of facing FGM could warrant refugee recognition.⁵⁸ This has remained the interpretive line in the jurisprudence since then, but the methodology for reaching such a conclusion was and remains rather unclear. In some cases, Canadian decision makers seemed to rely on human rights to assess FGM-based claims, although quite implicitly,⁵⁹ whilst in other cases, they adopted ad hoc approaches.⁶⁰

The US jurisprudence also adopted a favourable view on FGM claims. For instance, in the landmark case *Matter of Kasinga*, the BIA considered that FGM, 'which results in permanent disfigurement and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of

⁵⁵ Daniel J. Steinbock, 'Interpreting the Refugee Definition' [1998] 45 UCLA Law Review 733, 778.

⁵⁶ Ibid.

⁵⁷ Hoepfner (n 3) 292.

⁵⁸ *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh* [1994] No T93-12198, T93-12199, T93-12199, T12197 Canada: Immigration and Refugee Board of Canada: in this case the Board acknowledged that the risk of FGM would be contrary to the CRC.

⁵⁹ Ibid. See also *MA1-07929* [2002] Immigration and Refugee board of Canada (refugee division) 2.

⁶⁰ *Faustina Annan v Minister of Citizenship and Immigration of Canada* [1995] IMM-215-95 Canada: Federal Court: the Court qualified FGM as a 'cruel and barbaric' practice and granted refugee status to the claimant at [3].

persecution’.⁶¹ This position has been quite consistent since then in the US jurisprudence. Although no clear line of interpretation is noticeable for those cases, authors have argued that the development of human rights has significantly influenced the decisions of judges. For instance, Hathaway mentioned a series of cases in the US in which FGM has been considered a human rights violation.⁶² Anker⁶³ also noted that the jurisprudence in this field evolved through the influence of human rights law. In line with the above developments, Australia also considered that a future risk of FGM, or a risk of being re-subjected to genital mutilation, amounts to persecution.⁶⁴ The influence of human rights was notable, for instance, in *Case No 1101038*, where the Refugee Tribunal of Australia (RRTA) considered that FGM involved a ‘threat to life’⁶⁵ and hence constituted persecution.

A favourable approach to FGM claims has been also adopted in Europe.⁶⁶ In particular, in the UK, judges often considered that a risk of FGM can amount to persecution⁶⁷. For instance, in *Fornah*, the House of Lords agreed that the harm faced by the applicant consisted in a human rights violation.⁶⁸⁶⁹ Similar to the above evolution, France and Belgium also tended

⁶¹ *Matter of Kasinga*; 21 I&N Dec 357, 365 (Board of Immigration Appeal 1996); see other cases in the US which adopted the same approach: *Abankwah v. INS*, 185 F.3d 18, 23-24 (2nd Circuit Court 1999); *Abay. Ashcroft*, 368 F.3d 634 (United States Court of Appeals for the Sixth Circuit 2004). *Matter of A-T, Respondent*, 24 I&N Dec (Decided by the US Attorney General 2008); *Khadija Ahmed Mohamed v Alberto R. Gonzales*, Attorney General 400 F.3d 785 (US Court of Appeals, Ninth Circuit 2005): the Court found that FGM amounts to ‘continuing and permanent persecution’ at 3085.

⁶² James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 215.

⁶³ Anker (n 16) 54.

⁶⁴ Australia: FGM and forced marriage amount to serious harm hence persecution in RRT *Case No 1101038* [2011] RRTA, 307 (14 April 2011); RRT *Case No 0808751* [2009] RRTA 217 (18 March 2009).

⁶⁵ *Ibid.*

⁶⁶ Hana Cheikh Ali, Christel Querton and Elodie Soulard, *Gender-related Claims in Europe: Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States* (Directorate General for Internal Policies, Policy department C: Citizens’ rights and Constitutional Affairs, European Parliament, 2012) 36.

⁶⁷ However, a researcher pointed out that very few negative decisions were published in the UK, and efforts to obtain samples remained unanswered, thus relativizing this positive observation in Maja Grundler, *The Protection of Asylum Seekers Against Female Genital Mutilation in the UK* (Humboldt-Universität zu Berlin Centre for British Studies 2015) 41.

⁶⁸ *Zainad Esther Fornah v Secretary of State for the Home* [2006] UKHL 46, 18 October 2006: see Baroness Held of Richmond at [94] ‘it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment’.

⁶⁹ See other cases granting refugee status to victims of FGM: *VM (FGM - Risks - Mungiki - Kikuyu/Gikuyu) Kenya v Secretary of State for the Home Department*, CG [2008] UKAIT 00049, 9 June 2008. *K and others (FGM) The Gambia CG v. Secretary of State for the Home Department*, [2013] UKUT 00062(IAC), April 2013.

to consider that an act of FGM could rise to the level of persecution⁷⁰ although they rarely relied on a human rights scheme. In the case of *Melle Diop*,⁷¹ the French judges stated that FGM could be a basis for asylum for reasons of membership to a particular social group. They, nonetheless, restricted the scope of persecution as they posited that refugee status could only be granted if the practice of FGM was condoned or actively tolerated by the state, thus insisting on the necessary public dimension of the notion of persecution. Hoepfner regretted this approach as he noted that the requirement of an active participation of the authorities in these kinds of harm had discouraged claimants to lodge asylum on that account until the early 2000s in Europe.⁷² Fortunately, the jurisprudence further evolved in France, in particular after the adoption of the QD and the abandoning of the accountability theory. Nowadays, prospective victims of FGM in France tend to be granted refugee status without having to demonstrate that they had sought protection from the authorities before leaving their country.⁷³

Regrettably, France has, however, recently developed a restrictive jurisprudential trend for children born after their parents' departure from their place of origin. In *Mlle K*,⁷⁴ the CNDA considered that girls born in France and fearing to undergo FGM in their country would not meet the criteria of the 1951 Convention. According to the French judges, these claimants should instead be granted subsidiary protection. No clear framework of analysis has been, however, adopted to justify this position as the court merely stated that there is no reasonable likelihood that these girls will be individually singled out in their place of origin. This approach clearly disregards important discriminatory elements of FGM perpetrated against women.⁷⁵ In another case,⁷⁶ the court adopted an even narrower view by rejecting the application

⁷⁰ See *Arrêt n° 61.832*, Belgium: Conseil du Contentieux des Etrangers, 19 Mai 2011; CNDA 21 Décembre 2012 N° 332491; *Arrêt n° 138 876*, Belgium: Conseil du Contentieux des Etrangers, 19 Février 2015.

In France, another case also recognized that FGM amounts to persecution: CRR, 16 Juin 2005, N 492440, *Mlle S*.

⁷¹ CRR, 17 juillet 1991, 164078, *Mlle Diop Aminata*.

⁷² Hoepfner (n 3) 299.

⁷³ Ibid 300.

⁷⁴ CNDA, Decision du 12 Mars 2009, *Mme Mariam Diarra ép. Kouyate*, n° 638891; CNDA Décision du 25 mars 2010 *M. S.* n° 08017355 C+.

⁷⁵ UNHCR, Guidance Note on Refugee Claims Relating to Female Genital Mutilation, May 2009 at [1].

⁷⁶ Hoepfner (n 3) 305.

of a child born in France on the mere ground of her young age. Hoepfner pointed out that this interpretation was concerning, because the element of ‘age’ does not normally constitute a bar to refugee status under the 1951 Convention.⁷⁷ The above cases exemplify the pitfalls of ad hoc interpretive frameworks that tend, at times, to present little or inaccurate justifications for a decision. The French jurisprudence on that point has been qualified as “ambiguous” by a report of the European Parliament.⁷⁸

Various interpretive approaches have been adopted in national jurisdictions for adjudicating FGM claims, but it can be noted that the general influence of human rights has been positive for claimants and has led to an increasing recognition of individuals at risk of undergoing FGM. However, by focusing on the physical act of FGM and its consequences on the applicant’s health and security, decision makers have at times disregarded other aspects of the applicant’s claim as will be considered below. For instance, peripheral aspects of FGM such as the claims of parents whose girls are at risk of facing FGM, or girls who themselves can manage to avoid FGM upon return to their country are inconsistently addressed. In these cases, ad hoc methodologies seemed to have been adopted, thus yielding different results.

iii-Peripheral aspects of the harms surrounding the act of FGM

Hoepfner observed the emergence of subsequent waves of FGM claims, involving parents of little girls⁷⁹ at risk of genital mutilation in their country. The conceptual difficulties that arise from these types of claim, concern the forms of harm that the parents themselves are likely to face in their place of origin. A human rights interpretive framework often fails to address issues of concern, relating to the mental suffering of the parents of the girl who avoided the FGM, as well as the ostracism or stigmatisation of these parents. Indeed, refusing to engage in FGM can have even wider repercussions on the family itself in certain tribal societies. Whilst these

⁷⁷ Hoepfner *ibid.*

⁷⁸ Cheikh Ali et al (n 66) 37.

⁷⁹ Hoepfner (n 3) 302.

claims might not always be viewed as being gender-related per se, they are nonetheless tied to a specific perception of the roles of women in the society. Additionally, the claims of girls who managed to avoid FGM and are not risk of further FGM acts upon return (i.e. for instance when they are supported by their own parents) also raise concerns that are larger than the mere physical harm, such as for instance risks of stigmatisation or ostracism.

In France, the CNDA usually considers that the parents' opposition to their daughter's excision is not sufficient to establish their fear of persecution. Whilst some cases have granted refugee status to the parents of little girls who escaped their country with their child,⁸⁰ the court has more regularly denied these applications. In the view of the court, parents should demonstrate that they had actively expressed their position when they were in their country and that, as a result, they are at risk of being individually targeted.⁸¹ The ad hoc methodology used in France does not provide any justification as to why these forms of harm are not considered persecutory in nature. According to this approach, it can be observed that no consideration is given to the weight of traditional rules in the community, nor to the possible pressure that parents, or children who want to avoid FGM, can face upon return.

In the USA,⁸² the Board also denied the application for withholding of removal of a father who refused to return to his country because of the risk of FGM that his child could face. The Board concluded that because the father repeatedly claimed that he was afraid more for his daughter than for himself, there was no risk that 'his life or freedom would be threatened'.⁸³ The claimant, however, insisted several times that he would be harassed and humiliated upon return. He also referred to the UNHCR guidance stating that, depending on the individual circumstances, parents of children likely to face FGM could have a refugee claim. It should also be pointed out that this claimant further mentioned the possibility of facing 'emotional persecution'.

⁸⁰ Ibid.

⁸¹ CNDA SR 12 March 2009 *Mme K*. n° 08019372/638891 R; CNDA 25 mars 2010 *M. S*. n° 08017355 C+.

⁸² *Kane v Holder*, 581 F.3d 231, 240–42 (United States Court of Appeals for the Fifth Circuit 2009).

⁸³ Ibid at [23].

The court rejected this argument and concluded that, in order to warrant refugee status, ‘emotional persecution’ should be directly and purposely inflicted on the victim. However, this position is not in line with previous jurisprudence⁸⁴ as well as with the recommendations of the UNHCR.⁸⁵ Additionally, the court stated that no derivative claims could be considered. As such, the court did not consider the existence of a personal claim, resulting from possible harassment, pressure from the community and stigmatisation, therefore adopting a narrow understanding of the different forms of harm that can be caused by the imposition of FGM on a girl child. The refusal of family members to subject their child to the ritual of FGM can indeed have major consequences as it contravenes social norms. Whilst it is not argued that every parent of a child born in the country of asylum and originating from a country where FGM is prevalent should be recognised, a more thorough assessment of the applicant’s individual circumstances should be conducted, in order to minimise the risk of arbitrary decisions. The UNHCR, in particular, encourages decision makers to consider different forms of harm that could be suffered by parents who are ‘forced to witness the pain and suffering of the child’ or ‘who are opposed to the practice’.⁸⁶

In recent years, some cases have, in fact, been adjudicated more favourably, although reservations remained in relation to the legal grounds for protection. For instance, in the UK, the Appeal Tribunal⁸⁷ dismissed the claims for protection under the 1951 Convention of a family who feared returning to Sudan because their daughter was at risk of facing FGM. In this case, the tribunal adopted a rather narrow understanding of persecution, as the judges seemed to have conflated the Convention grounds with the notion of persecution. The tribunal rejected the fact that young girls at risk of FGM could constitute a particular social group (PSG) and concluded that there was no real risk of persecution.⁸⁸ The tribunal, however, considered *non-refoulement* obligations as it stated that the claimants, including the parents,

⁸⁴ Matter of *Kasinga* (n 61).

⁸⁵ UNHCR, (n 75) at [11].

⁸⁶ *Ibid.*

⁸⁷ *MH and Others (Article 3 – FGM) Sudan CG* [2002] UKIAT 02691, 16 July 2002.

⁸⁸ *Ibid* at [23].

were all at risk of facing violations of rights entailed in the ECHR. To the tribunal, to send the ‘first appellant and his family back to a country where circumcision would take place to the first appellant’s daughter, would be degrading for the appellant as a family member, and would amount to a breach of Article 3 of the ECHR’.⁸⁹ The tribunal’s interpretation of both the Convention nexus and the concept of persecution was quite restrictive and inconsistent with the view that victims of FGM can constitute a PSG,⁹⁰ and that persecution does not necessarily have to encompass the Convention grounds.⁹¹ However, the idea that parents of FGM victims could face harm upon return is noteworthy, although it was not found to constitute a basis for refugee status under the 1951 Convention. A later case further developed that view and eventually stated that ‘given the first appellant’s abhorrence of FGM, any infliction of it upon either of her daughters is, we find, reasonably likely to have so profound an effect upon the first appellant as to amount to the infliction on her of persecutory harm’.⁹²

Similarly, in another case, the tribunal made a general statement that FGM in ‘any of forms 1-4 is persecution for a Convention reason not only of a girl child but also of the parents of a minor child where they are opposed to the procedure and where there is a real risk of its infliction’.⁹³ In this case, only the claim of the child was considered, but the tribunal affirmed a principle that parents of children could have an individual claim, even when they had not actively expressed their opposition in the country of origin as was the case in this situation. This approach was more closely aligned with the recommendation of the UNHCR guidelines⁹⁴ and by following this line of argumentation, the tribunal adopted a view that was more protective for the claimants. This decision is not isolated as other few cases lodged in other countries by parents fearing FGM for their children have been adjudicated in

⁸⁹ Ibid at [14].

⁹⁰ As recommended by UNHCR (n 76) and accepted in the Jurisprudence. See, for instance, *Fornah* (n 69).

⁹¹ See discussion, Chapter 3, Part 2 (B).

⁹² *FM (FGM) Sudan v Secretary of State for the Home Department*, CG [2007] UKAIT00060, 27 June 2007 at [161].

⁹³ *K and others (FGM) The Gambia CG v. Secretary of State for the Home Department*, [2013] UKUT 00062(IAC), April 2013 at [13].

⁹⁴ Ibid at [12].

a more favourable manner,⁹⁵ albeit quite rarely. Of note, however, is that refugee status tends to be granted when the imposition of FGM appears highly likely. Consideration of what would happen to parents or girls who managed to avoid the act is, however, rarely part of the jurisprudence, although the consequences on their lives could, in certain contexts, be particularly problematic.

iv-Concluding remarks

In all the cases mentioned above, decision makers tended to adopt various approaches that have led to inconsistent results. The human rights narrative has indeed appeared inadequate in these kinds of cases as it mainly focuses on the physical act of FGM and disregards other aspects of the suffering that can ensue from this practice. This situation has led Marouf to regret that the psychological and emotional aspects of FGM are rarely taken into account⁹⁶ in courts. It appears, however, that methodologies that are closer to the UNHCR's circumstantial approach, have the capacity to yield more protective results by encouraging a holistic analysis of refugee claims, factoring in the above aspects. Although asylum applications involving parents of children at risk of FGM are not particularly frequent in national jurisdictions, they tend to raise contention. These claims reveal important aspects of FGM as a traditional practice that is deeply embedded in certain societies and structures the roles of women in relation to men. As a result, opposing this practice has wider implications than the mere risk of physical harm that this can cause, both for the victims and their relatives.

It is acknowledged that such claims should certainly be treated with caution as they could potentially concern a very large number of claimants

⁹⁵ *Arrêt n°45.395* Belgium: Conseil du Contentieux des Etrangers, 24 June 2010: in this case, the fear expressed by the applicant that her daughter could be subjected to FGM was sufficient to consider that she would be perceived as opposing traditions and social mores upon return. See also *Nwaokolo Immigration and Naturalization Service*, 314 F.3d 303 (United States Court of Appeals for the Seventh Circuit 2002): The Court of Appeal returned a case to the BIA as the BIA only assessed the risk of FGM for the main applicant, but failed to consider that her daughter could also face a real risk if she had to return with her mother and did not analyze the impact that this could have on both individuals.

⁹⁶ Fatma Marouf, 'The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm' [2011] 22 *Columbia Journal Gender and Law* 81, 85-86.

and constitute an avenue for fraud. Nonetheless, for the sake of fair and transparent decisions, a more thorough and transparent analysis of the risk of persecution of the relatives implicated in a potential risk of FGM should be conducted. Similarly, the claims of girls who are not at risk of facing FGM upon return (for instance because the parents are opposed to it), should be more comprehensively assessed so as to take into account various forms of predicaments that they could endure back in their country.

B) Domestic violence

i-General overview of the notion of domestic violence in asylum cases

Harmful practices against women can also take the form of domestic violence when they are perpetrated by family members. Traditionally, asylum judges have been quite hesitant to grant refugee status to victims of domestic violence as they considered that such situations fell outside the ambit of the 1951 Convention⁹⁷ because of the perceived private nature of the harm.⁹⁸ For instance, a decision of the US BIA in 1975 denied the application of a victim of domestic violence because the motivation behind her husband's alleged actions was deemed 'strictly personal'.⁹⁹ However, legal developments on the international scene led to a consideration that the violence perpetrated within the family sphere was in fact in breach of human rights law and that it could fall within the refugee definition.¹⁰⁰¹⁰¹ In this sense, the UNHCR

⁹⁷ Roberts (n 39) 161-163. See also Anker (n 41) 133.

⁹⁸ Michael G. Heyman 'Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations' [2005] 17 International Journal of Refugee Law 729, 730. For him, domestic violence 'challenges the common understanding of persecution as an act occurring within the public sphere'.

⁹⁹ *Matter of Pierre*, 15 I&N 2433 (Board of Immigration Appeals 1975) at [4610]. See also on the same issue *Matter of R-A-*, 22 I&N Dec 906 (BIA 1999).

¹⁰⁰ In past decades an increasing number of international instruments addressed the treatment of women in the context of their traditional community and their family. For instance, Article 16 CEDAW laid out measures for eliminating discrimination between men and women in the context of their marriage. See also: Committee on the Elimination of Discrimination Against Women, General Recommendation No 19 (11th session, 1992). In 1993, the General Assembly adopted a Declaration on the Elimination of Violence Against Women, stating that reprehensible violence against women encompasses "physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional harmful practice UN General Assembly 48/104. Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, Art 2 (a).

¹⁰¹ See Anker (n 16) and Kneebone (n 3) who argued that human rights influenced the way gender-based persecution was interpreted.

guidelines on gender-related persecution stated that domestic violence can amount to persecution depending on the circumstances.¹⁰²

Whilst domestic jurisdictions have been increasingly inclined to consider that domestic violence itself could constitute persecution, inconsistent approaches have been adopted with regard to the different elements that needed to be considered in assessing such claims, and in particular, in relation to the role of state protection.¹⁰³ However, overall, decision makers have not required the active participation of the authorities and granted refugee status as long as there was no reasonable possibility that the state could provide efficient protection to the victims. A general overview of the different interpretive frameworks adopted in cases of domestic violence will, instead, reveal that significant interpretive issues rather lie in the level and nature of harm required to amount to persecution and further question the relevance of this notion in such cases. Whilst the human rights framework remains the dominant one, divergent views have been expressed on what forms of human rights violations could amount to persecution, both between and within jurisdictions, thus reinforcing the legal uncertainty surrounding the adjudication of such cases.

ii- Conceptual confusion regarding the degree of harm in cases of domestic violence in common-law jurisdictions

As noted by Hoepfner, asylum applications relating to domestic violence started to significantly increase in Canada and New Zealand as of the 1980s and 1990s.¹⁰⁴ One of the first landmark decisions to address the issue of domestic violence was *Mayers*¹⁰⁵ where the Federal Court of Canada considered that the risk of ill-treatment faced by the claimant (beating, rape and witnessing the ill-treatment of her children) compounded by the indifference of the authorities, amounted to persecution. The court simply

¹⁰² UNHCR (n 7) at [9].

¹⁰³ Kneebone (n 3) 38; Hoepfner (n 3) 315-324: this element has been particularly discussed in the jurisprudence in Canada and New Zealand.

¹⁰⁴ Hoepfner (n 3) 315.

¹⁰⁵ *Canada c Mayer* [1992] A-544-92 Canada: Federal Court.

highlighted that the violence endured by the claimant should not be considered as private given the clear indifference of the authorities to her plight. In this case, the court conflated the existence of harm with the absence of state protection, thus seemingly conforming to Hathaway's framework. Whilst the court adopted a rather protective view, no detailed interpretive methodology was applied, and, as such, little explanation was presented as to why these forms of harm constituted persecution.

The view that domestic violence could amount to persecution was later confirmed by the same court in *Narvaez*.¹⁰⁶ In this case, however, the court explicitly adopted a human rights approach as it was stated that the ill-treatment received by the claimant at the hands of her husband was contrary to the principles enshrined in the UDHR. The court further followed Hathaway's approach by considering that the violation of human rights should be either sustained or systemic. Whilst the above cases resulted in a positive outcome for the claimants, it should be noted that the mistreatment they had faced was particularly severe.¹⁰⁷ Although it became clear that severe instances of domestic violence could constitute a basis for asylum, the bar set by the human rights approach appeared quite high. As a result, question marks remained for interpreting persecution in light of milder forms of ill-treatment. Subsequent jurisprudence did not lift the uncertainty regarding these cases in Canada because, in practice, many cases tend to be rejected on various other issues, in particular on credibility grounds.¹⁰⁸ However, when claimants are victims of severe physical violence and harassment at the hands of their family members, the harm they experienced would usually be considered persecution without much controversy. Unfortunately, high thresholds seem to have been generally applied.

¹⁰⁶ *Cecilia Narvaez, Miguel Alexandro Narvaez et Daniel Antonio Narvaez c Ministre de la Citoyenneté et de l'immigration* [1995] 89 F.T.R. 94 (TD) Canada: Federal Court, Trial Division.

¹⁰⁷ In *Mayers* and *Narvaez* both claimants faced instances of beating, physical ill-treatment and rape over many years.

¹⁰⁸ Hoepfner (n 3) 322. See examples of cases rejected on credibility or IFA: *Canada MA4-07115* [2006] Canada: Immigration and Refugee Board; *X v Canada VB3-02197* [2014] Canada: Immigration and Refugee Board; *X v Canada, MB3-04040* [2014] Canada: Immigration and Refugee Board of Canada.

In New Zealand, the jurisprudence is more variable. Judges, who tend to rely on ad hoc human rights approaches, have made inconsistent decisions, adopting either broad or restrictive views of the notion of persecution. For instance, the RSAA¹⁰⁹ granted refugee status to an Iranian applicant who had never experienced individual instances of physical aggression but who was quite outspoken against the patriarchal nature of Iranian society and was deeply affected by the fate her two of cousins who had been killed by family members for not conforming to the society's norms. In this case, the RSAA quoted earlier jurisprudence that referred to Hathaway's definition. However, the RSAA ended up analysing a series of human rights violations, without relying on Hathaway's interpretive modalities. The RSAA also engaged in a more circumstantial analysis, by considering subjective elements such as the psychological state of mind of the applicant and how it impacted the assessment of the harm. Additionally, the notion of shame and its consequences were analysed¹¹⁰ to conclude that the harm feared was of 'sufficient gravity' to amount to persecution. In this case, the RSAA adopted an expanded human rights approach by referring to multiple aspects of the applicant's situation through a holistic analysis and ended up relying on a rather protective interpretation of the notion of persecution.

Conversely, in later cases, the RSAA seemed to impose a stricter test to assess the notion of persecution, thus departing from its previous approach. For instance, in another decision,¹¹¹ the RSAA explicitly adopted the formulation of Hathaway and concluded that the series of predicaments faced by the applicant was not sufficient to rise to the level of persecution. In this case, an applicant was considered at risk of facing harassment, persistent phone calls and extortion. She had also faced one instance of physical assault by her husband. However, according to the RSAA 'such harassment, while possibly extremely unpleasant, does not amount to a sustained or systemic

¹⁰⁹ *Refugee Appeal No. 2039/93 Re MN*, New Zealand: RSAA (12 February 1996).

¹¹⁰ The RSAA pointed out that 'phenomenon of "honour and shame" bears a direct relation to family ties, and to the complex interrelation of social organisation and conduct in Arab society. Once a woman breaks the rules, the whole family will be drawn into a sea of shame'.

¹¹¹ *Refugee Appeal Nos. 76264, 76265 & 76266*, Nos. 76264, 76265 & 76266, New Zealand: RSAA (16 December 2008).

violation of human rights'.¹¹² Unlike their previous judgments, the RSAA, here, mainly focused on the absence of systematic physical violence and failed to discuss other parameters such as the impact that these events had on the emotional stability of the applicant, and whether this treatment breached other protection standards.

This high threshold was reaffirmed in *Refugee Appeal No. 76501* where the RSAA recognised a refugee a woman from the Fiji Island who had suffered ongoing incidents of severe physical violence and harassment for several years. The RSAA concluded that her predicament had met 'the threshold of persecution as it [constituted] a breach of the fundamental human rights not to be subjected to cruel, inhuman or degrading treatment or punishment'.¹¹³ Whilst the outcome was positive in this case, the threshold set by the court appeared, again, quite high given the particularly severe forms of harm faced.¹¹⁴ Overall, it seems that the human rights narrative adopted by some decision makers in New Zealand led to the imposition of different thresholds, depending on the modalities adopted.

Cases in the USA followed the same inconsistent pattern of interpretation, in particular when references to human rights treaties were made. Given that some domestic violence cases in the US remained unpublished for a long period of time,¹¹⁵ an exhaustive analysis of the approach adopted by American jurisdictions is difficult. Anker, however, argued that human rights activism had influenced the US jurisprudence in a positive manner leading judges to recognise more often certain forms of gender-based violence.¹¹⁶ Whilst this element is not denied, it seems that the influence of human rights has not fostered much clarity in the case law. In particular, published cases of domestic violence victims who have been

¹¹² Ibid at [42].

¹¹³ *Refugee Appeal No. 76501*, RSAA (19 November 2010) at [56].

¹¹⁴ On the existence of high threshold see also *Refugee Appeal No. 75805 and 75806*, RSAA (30 November 2007): claimant was granted refugee status but she had to endure years of physical, psychological and sexual abuse.

¹¹⁵ Anker (n 16) 52. Karen Musalo, 'A Short History of Gender Asylum in the United States Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women's Claims' [2010] 29 *Refugee Survey Quarterly* 46, 62. Musalo also pointed that the government does not maintain statistics on gender-claims.

¹¹⁶ Anker (n 16).

granted refugee status are rare. Additionally, the victims that have been recognised have usually suffered egregious forms of harm for a long period at the hands of their family members, thus reflecting extreme cases of violence.

For instance, in the case of Rudi Alvaro Pena, the BIA initially rejected the claim of a Guatemalan applicant who had faced severe forms of domestic violence over several years, and who tried to seek protection from the police a few times, but to no avail. Initially, the BIA considered that the harm faced by the applicant was so intense that it could amount to persecution. In spite of this conclusion, the case was rejected due a lack of Convention nexus¹¹⁷ but the decision was eventually overturned about 10 years later.¹¹⁸ This case showed that, whilst some reluctance has been expressed by US judges to recognise victims of domestic violence, individuals who have endured severe forms would tend to be more favourably adjudicated. This high threshold requirement seems to have been later confirmed when the BIA in the US published a landmark decision in 2014, stating that another Guatemalan woman who had suffered years of abuse at the hands of her husband faced harm amounting to persecution.¹¹⁹ In this case the abuse that the claimant had faced was quite abhorrent as it included physical beating, burning, rape and death threats. It remains unclear whether milder forms of ill-treatment in the US would meet the threshold to be recognised as a refugee.

The Australian case law is also marred with uncertainty in that regards. The position of the jurisprudence on gender-based claims was affirmed in the landmark decision, *Khawar*.¹²⁰ In this case, the judges considered that the violence experienced by the claimant compounded by the discriminatory attitude of the police towards women, amounted to a violation

¹¹⁷ *Matter of R-A*- 22 I&N Dec 906 (Board of Immigration Appeal 1999) 910: mentioned in Musalo (n 117) 57. See also a positive decision: *DHS's Supplemental Brief, Matter of L-R*- (Board of Immigration Appeal, 2009):

https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf

¹¹⁸ *Matter of R-A*, Interim Decision, 24 I&N Dec 629 (Attorney General 2008).

¹¹⁹ *Matter of A-R-C-G* 26 I&N Dec 388 (Board of Immigration Appeal 2014) 388.

¹²⁰ *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, Australia: High Court, 11 April 2002.

of her fundamental human rights. Reference was made to Hathaway's framework requiring 'sustained and systematic violations of a basic human right',¹²¹ thus setting again a relatively strict test. It was also considered that the absence of state protection was an element of persecution.

The interpretive methodology developed in *Khawar* has not, fortunately, been scrupulously followed in subsequent cases. Since then, the claims of victims of domestic violence have tended to be more favourably adjudicated, but judges have adopted variable approaches for interpreting persecution. In many cases, they did not use a fundamental human rights framework, but rather focused on the 'serious harm' approach, therefore evaluating the harm more on an ad hoc basis. Unlike the high threshold adopted in *Khawar*, other cases have adopted different views, recognising a wider variety of types of harm as persecution. For instance, it was determined that 'serious physical harm',¹²² 'physical harassment',¹²³ or mere 'threat',¹²⁴ could amount to serious harm, and thus persecution. Whilst the above decisions appear more protective of refugees today, the consequential impacts of the domestic violence suffered was not assessed and, therefore, the decision makers did not provide a clear reasoning as to why they considered that such acts amounted to persecution. As a result, no consistent pattern of interpretation could be identified.

iii- Domestic violence in the jurisprudence of European countries:
inconsistent interpretations of the threshold and nature of harm

The case law on domestic violence in European countries is even more inconsistent both between and within jurisdictions. Indeed, some judges consider that acts of domestic violence amount to persecution if they are sufficiently severe while others consider that such claims simply fall outside the ambit of the 1951 Convention. For instance, in the seminal case, *Islam; Ex parte Shah*, the UK House of Lords examined the claim of two Pakistani

¹²¹ Ibid at [70].

¹²² Case no. 1406045, RRTA 47 (9 February 2015) at [24].

¹²³ Case No. 0907337, RRTA 165 (15 March 2010) at [87].

¹²⁴ Case No.1002606, RRTA 484 (6 June 2010) at [107].

women who were both victims of domestic violence at the hands of their husband. Because of the discriminatory treatment of women in Pakistan and the lack of effective protection, the court found that women in Pakistan constituted a particular social group¹²⁵ and therefore, victims of domestic violence could be granted refugee status. In these cases, the harm feared by the claimants was quite severe (prosecution on account of false accusation of adultery) and little doubt was expressed as the fact that such harm amounted to persecution.

In cases of other forms of harm, different views have, however, been noted. For instance, in *DM Albania*, the asylum judges applied a very high threshold in assessing the notion of persecution as they analysed the harm suffered by the claimant against Article 3 of the ECHR. The judges found that the continued life threats and harassment together with one incident of physical violence and one unsuccessful attempt at relocation were not sufficient to conclude that the treatment faced by an Albanian woman by her ex-partner constituted a breach of Article 3 of the Convention. Consequently, they decided that such harm did not amount to persecution and added that, in any case, state protection was available.¹²⁶ A recent report published by the European Parliament on the treatment of gender-related claims in Europe lamented the fact that judges in the UK ‘do not always appreciate that where there had been one incident of physical violence in the relationship (irrespective of other forms of psychological abuse) this could amount to persecution’.¹²⁷

Conversely, in another decision, judges considered that the threats and intimidations by the claimant’s husband, compounded by a short term of detention (based on false adultery charges that were likely to be dropped)

¹²⁵ *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 UKHL (Judicial Committee), 25 March 1999.

¹²⁶ *DM (Sufficiency of Protection - PSG - Women - Domestic Violence) Albania v Secretary of State for the Home Department*, CG [2004] UKIAT 00059, 1 April 2004. At [14] ‘We are therefore satisfied that, upsetting though they may have been, the actions of the former boyfriend did not amount to persecution or prohibited treatment for the purposes of Article 3 as they were not engaging a sufficiently high threshold to do so’.

¹²⁷ Cheikh Ali et al (n 66) 39.

amounted to persecution.¹²⁸ In this case, the court relied on the guidance provided by the QD, and seemed to set a high threshold to the test of persecution by referring to Article 3 of the ECHR as a benchmark. This led to considerations that first appeared relatively severe in the sense that the detention experience of the applicant was considered in the abstract and was not found to amount to persecution per se. The court, however, went on to acknowledge that other circumstances, such as the harassment that the applicant was facing at the hands of her husband, should be taken into consideration. All her experiences were found, cumulatively, to reach the level of persecution. It was, however concluded that the claimant could relocate within Pakistan, far from her husband. Although the assessment of the notion of persecution was quite comprehensive in this case, the IFA test was applied in a restrictive manner. For the IFA test, UNHCR usually recommends assessing whether it is reasonable¹²⁹ for an applicant to relocate in light of their personal circumstances, but, in this decision, the tribunal considered that in spite of ongoing discriminations faced by single women in Pakistan, the applicant could settle alone in another city, which seems rather strict in light of UNHCR recommendations. This is unfortunate, in particular given the thorough and protective approach initially adopted by the judges when they evaluated the notion of persecution.

The uncertainty of the adequate threshold to apply in domestic violence cases is also exemplified in another case in which the first instance and appeal decisions makers reached completely different conclusions by applying different interpretive approaches. The first instance tribunal considered that the treatment faced by an applicant at the hands of her husband, namely a series of physical ill-treatments such as slaps, pushing and on one occasion a punch, constituted ‘occasional outburst of violence’¹³⁰ and did not amount to persecution as per Art. 9 of QD. According to the tribunal,

¹²⁸ *KA, AA, & IK (domestic violence - risk on return) Pakistan v Secretary of State for the Home Department*, CG [2010] UKUT 216 (IAC), 22 April 2010 at [260].

¹²⁹ UNHCR Guidelines on International Protection No 4: ‘Internal Flight or Relocation Alternative Within the Context of Article 1A(2) of the 1951 Convention and/or Protocol Relating to the Status of Refugees’, HCR/GIP/03/04, 23 July 2003, 5.

¹³⁰ *D-D- (Anonymity direction made) and Secretary of State for the Home Department* [2016] AA 12842, Upper Tribunal (Immigration and Asylum Chamber) 12 December 2016 at [17].

it simply did not amount to a serious violation of basic human rights. Adopting a very different view on this, the Appeal Tribunal considered that the first instance decision makers have erred in concluding that the applicant did not experience persecution. Instead, it was considered that:

‘a horrible element of domestic violence is [...] the fact that violence inflicted in a relationship where the victim [...] should be entitled to support and affection. When that is replaced by violence, bullying and controlling behavior it is horrible for her and there is clear evidence here of repeated nasty acts of violence intended to humiliate the victim. This is clearly sufficiently severe as to amount to persecution’.¹³¹

In this case, both tribunals adopted very different lines of interpretation, which led to opposite outcomes. The first instance tribunal relied on a rather formalist human rights narrative, whilst the Appeal Authority, did not develop a clear methodology and simply assessed the level of ‘gravity’ of the act, which resulted in a more protective approach. In all, the jurisprudence in the UK has generally adopted the view that domestic violence could amount to persecution, but the forms that domestic violence could take remain unclear depending on the interpretive method used.

More significant inconsistencies are notable in French jurisdictions where victims of domestic violence are not normally considered eligible to refugee protection because domestic violence is deemed a personal act. Therefore, only subsidiary protection is granted to claimants. Further, the threshold for that is rather high, as victims would be granted protection if the act of domestic violence is accompanied by other elements such as forced marriage or opposition to social mores.¹³² The interpretive methodology of the appeal court is rather confusing because little explanation is provided to

¹³¹ Ibid at [34].

¹³² CNDA, *BA*, n°09 023 070, 17 November 2010; CNDA, n°09 006 617, 26 October 2010 mentioned in Cheikh Ali et al (n 66) 39. See also: Asise Mateo, Elodie Soulard, ‘Le Droit d’Asile Au Féminin, Cadre Législatif et Pratique’ (Observatoire de L’Asile et des Réfugiés) Les Cahiers du Social, No 32, 36.

justify this orientation. For instance, in *Mme T. ép. M.*¹³³, the judges considered that a Russian claimant who had experienced ill-treatment from her husband did not meet the eligibility criteria of the 1951 Convention and was granted subsidiary protection. However, no explanation was given for such a decision. Other cases followed the same position.¹³⁴ Conversely, in Belgium, a Russian claimant who also experienced violence similar to the one mentioned above was granted refugee status.¹³⁵ Unlike the approach in France, Belgian judges took into account all the personal circumstances of the claimants in order to evaluate the risk of harm upon return, including the trauma suffered and mental distress caused by the experience of mistreatment and considered that such violence is based on a convention ground.¹³⁶ This approach has been reiterated in a recent case¹³⁷ and has been labelled as a ‘good practice’ by researchers of the European Parliament,¹³⁸ making the notion of persecution more adapted to these cases. As such, victims in Belgium are more generally entitled to refugee status under the 1951 Convention.

iv- Concluding remarks

In spite of inconsistent decisions amongst domestic jurisdictions, we observe an increased tendency to consider domestic violence as a form of persecution. Although this trend had perhaps been encouraged by the development of women’s rights on the international scene, as some authors have argued, the application of a human rights framework for interpreting persecution has not revealed itself to be particularly protective of the interests of women in a number of cases, thus undermining the relevance of the notion of persecution in certain situations. Additionally, the vagueness of human rights standards has caused inconsistent interpretations of the Convention

¹³³ CRR 2 Novembre 2007 412955, *Mme T. ép. M.* Cour Nationale du Droit d'Asile, *Contentieux des Réfugiés: Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile*, 15 April 2008.

¹³⁴ CNDA 26 Février 2009, n° 23.825; CNDA 9 juillet 2008, n° 13.874; CNDA 6 Septembre 2011 *Mme V.* n° 10023173 R; CNDA 12 Mars 2013, *Mme H.K., épouse G.* n°12017176 C.

¹³⁵ CNDA 9 juillet 2008, n° 13.874.

¹³⁶ CRR 14 December 2006 n°06-0817/F2548, mentioned in Cheikh Ail et al (n 66) 39.

¹³⁷ *X v Commissaire général aux réfugiés et aux apatrides*, Case No 177 178, Conseil du Contentieux des Etrangers, 27 Octobre 2016; see also *Arrêt n° 72 002*, Belgium: Conseil du Contentieux des Etrangers, 16 Décembre 2011, at 5.5.7.

¹³⁸ Cheikh Ail et al (n 66) 39.

with a particular focus on physical harm. Whilst extreme forms of harm do not seem to raise debate, milder breaches of human rights or other complex situations are more problematic so that the degree of harm required to amount to persecution remains unclear in most cases, as exemplified in the above analysis. Ad hoc approaches adopted by civil-law countries have also led to very divergent outcomes. As a result, a more coherent interpretive approach in order to evaluate the harm faced by an applicant appears necessary to reassert the importance of the concept of persecution for cases of domestic violence. Psychological as well as physical mistreatment need to be taken into consideration, in addition to the different protected interests of the claimants and the consequential impact that the violations of such interests can have on their lives. In particular, the political view that domestic violence is based on the traditional perception of women's roles in certain societies or communities, leading to possible ostracism or stigmatisation, should not be ignored as is too often the case in certain decisions.

C) Trafficking in persons and the conceptualisation of persecution

i-Definition and legal framework

Trafficking is a complex phenomenon that has been defined internationally in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, through a lengthy formulation, pointing to the importance of the means and purpose of the act of trafficking.¹³⁹ According to the UNHCR,

¹³⁹ Article 3: of Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York 15 November 2000, UNTS, Vol. 2237, 319, Doc.A/55/383: "For the purposes of this Protocol: (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article'.

trafficking involves ‘interrelated actions’¹⁴⁰ such as ‘abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment’.¹⁴¹

The causes and consequences of trafficking are multiple and have raised interpretive challenges in the jurisprudence. As pointed out by Dorevitch and Foster, the harm faced by victims of trafficking ‘is inflicted by multiple actors across a temporal and geographical continuum’ and therefore raises complex issues.¹⁴² In particular, given the numerous forms of harm that trafficking entails, confusion has emerged as to the types of predicaments that are involved in a situation of trafficking and whether such predicaments should amount to persecution. The absence of a nexus¹⁴³ or the availability of state protection have often constituted elements on which decision makers have relied for rejecting asylum applications of victims of trafficking. A comprehensive analysis of the Convention nexus or the availability of state protection would fall outside the purview of the present research as previously argued but the qualification of the harm faced by victims of trafficking as persecution has also raised major contention that will be assessed below.

Firstly, it should be noted that the causes of trafficking are an important element that can have a major importance in assessing the notion of persecution and should be factored into the analysis of the refugee definition. Some international instruments have emphasised the vulnerability of victims of trafficking by pointing to the root causes of this phenomenon. For instance, the Beijing Declaration considered that majors barriers to the security of women were ‘systematic or de facto discrimination, violations of and failure to protect all human rights and fundamental freedoms of all women, and their civil, cultural, economic, political and social rights,

¹⁴⁰ UNHCR (n 49) at [10].

¹⁴¹ Ibid at [15]

¹⁴² Anna Dorevitch and Michelle Foster, ‘Obstacles on the Road to Protection: Assessing the Treatment of Sex-trafficking Victims under Australia’s Migration and Refugee Law’ (2008) 9 Melbourne Journal of International Law 1, 40.

¹⁴³ Satvinder S. Juss, ‘Recognizing Refugee Status for Victims of Trafficking and the Myth of Progress’ [2015] 34 *Refugee Survey Quarterly* 107, 116. See also French jurisprudence rejecting claimants on the absence of a nexus: *Décision du Conseil d’État, Arrêt du 7 Novembre 2011, n°348228*; *Décision du Conseil d’État n° 350661, recueil Lebon, lecture du 25 Juillet 2013*.

including the right to development and ingrained prejudicial attitudes towards women and girls'.¹⁴⁴ The UN General Assembly also highlighted the underlying causes of trafficking by mentioning 'gender inequality, poverty, unemployment, lack of socio-economic opportunities, gender-based violence, discrimination and marginalization'.¹⁴⁵ Similarly, the UNHCR considered that 'scenarios in which trafficking can flourish frequently coincide with situations where potential victims may be vulnerable to trafficking [as it is the case for instance in states] prone to increased poverty, deprivation and dislocation of the civilian population'.¹⁴⁶ Finally, in 2002 the Office of the United Nations High Commissioner for Human Rights (OHCHR) issued Recommended Principles and Guidelines on Human Rights and Human Trafficking, identifying inequality, poverty and discrimination as major causes of trafficking.¹⁴⁷ As such, the social and economic situation of the victims prior to the trafficking experience is an important aspect that can have an impact on the condition of victims upon return to their country and, therefore, should have a major relevance for assessing the notion of persecution.

Moreover, in addition to the physical violence endured by the victims, certain consequences of trafficking are also important to evaluate what types of harm amount to persecution. In particular, various documents have highlighted the medical and psychological effect that trafficking has on the victims. For instance, the Beijing Declaration affirmed that 'exploitation places girls and women at high risk of physical and mental trauma'.¹⁴⁸ The UNHCR also insisted on the 'ongoing traumatic psychological effects'¹⁴⁹ of trafficking experiences. Some UN resolutions insisted on the necessity of adopting a gender- and age- sensitive approach to the problem of

¹⁴⁴ Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at [42].

¹⁴⁵ Resolution adopted by the United Nations General Assembly on 19 December 2016, [on the report of the Third Committee (A/71/477)] A/RES/71/167, 4/13.

¹⁴⁶ UNHCR (n 49) at [31].

¹⁴⁷ Office of the UNHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (HR/PUB/02/3), 2010, 1.

¹⁴⁸ Beijing Declaration (n 144) at [100].

¹⁴⁹ UNHCR (n 49) at [16].

trafficking¹⁵⁰ by noting the ‘heightened vulnerability’¹⁵¹ of women and girls who have been trafficked. These instruments all pointed to the various forms and intensity of harms resulting from trafficking.

From the normative framework described above, a series of vulnerabilities and predicaments can be identified as the root causes and consequences of trafficking. Prior to being trafficked, most victims would have generally experienced situations of gender discrimination and socio-economic disadvantage and, after being trafficked, they often suffer the psychological and physical consequences of their traumatic experience. It should be, therefore, expected that these conditions, including the socio-economic position of the claimant, which has been described by one author as the ‘most pervasive’¹⁵² reason for trafficking, would be taken into account to understand the profile of victims when interpreting the notion of persecution. Persecution being a forward-looking test, not all victims of trafficking might be entitled to refugee status but it will be necessary to assess whether the vulnerable profile of a claimant, compounded by other risk factors, can lead to further persecution. In this view, the UNHCR considered that even when the trafficking instance was a ‘one-off experience’¹⁵³ and is not likely to be repeated, other forms of harm could be faced by former trafficking victims upon return to their country. In particular, they could suffer from severe psychological difficulties arising out of past persecution,¹⁵⁴ potential reprisals¹⁵⁵ or ostracisms and discrimination.¹⁵⁶

A large variety of parameters therefore needs to be taken into consideration when interpreting the notion of persecution in order to make this notion relevant in the context of trafficking cases. Unfortunately, decision

¹⁵⁰ Resolution adopted by the General Assembly (n 145) at [34].

¹⁵¹ Ibid 4/13; see also Resolution adopted by the General Assembly on 30 July 2010 (A/64/L.64)] 64/293, A/64/PV.109, United Nations Global Plan of Action to Combat - Trafficking in Persons that promotes a ‘human rights based, gender- and age-sensitive approach in addressing all factors that make people vulnerable’ at [50].

¹⁵² Theodore R. Sangalis, ‘Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act’ [2011] 80 Fordham Law Review 403, 41.

¹⁵³ UNHCR (n 49) at [16].

¹⁵⁴ Ibid.

¹⁵⁵ Ibid at [17].

¹⁵⁶ Ibid [18].

makers in national jurisdictions have adopted inconsistent approaches on these issues as will be demonstrated below.

ii-The risk of (re)trafficking as a form of persecution

Saito observed that the risk of being trafficked itself (or re-trafficked) is consensually considered persecution in national jurisdictions.¹⁵⁷ Given the egregious forms of violence that trafficking entails, such as rape, forced labour, organ removal, beating and other forms of ill-treatment, the qualification of persecution has raised little debate. According to Saito, ‘cases show a general consensus in considering trafficking as a human rights violation that could amount to persecution’.¹⁵⁸ Dorevitch and Foster also considered that these types of acts clearly ‘are flagrant violations of international human rights’¹⁵⁹ and, therefore, are sufficiently serious as to amount to persecution.

In opposition to the above views, some early cases in Canada have adopted quite a narrow understanding of the harm that could be faced by the victims of trafficking by considering that when the consent of the claimant was initially given, the subjection to forced labour did not amount to trafficking. Therefore, in the cases of trafficking of Chinese minors, the Court disregarded the trafficking elements and simply analysed the penalty imposed on individuals for leaving a country illegally.¹⁶⁰ The applicants were rejected as it was considered that receiving a penalty for illegal departure did not rise to the level of persecution. The trafficking element was not taken into consideration, because the victims (who were minors at the time) had voluntarily left their country through illegal means and, therefore, it was not accepted that they had been trafficked against their will. Fortunately, this approach was overturned in *Li v Canada* as the court considered that

¹⁵⁷ Saito Kaori, Research Paper No 149, ‘International protection for trafficked persons and those who fear being trafficked’ Policy Officer Division of Human Resource Management UNHCR, December 2007 Geneva, 16.

¹⁵⁸ Ibid 11.

¹⁵⁹ Dorevitch and Foster (n 142) 19.

¹⁶⁰ *Bian v (Minister of Citizenship and Immigration)* [2000] IMM-1640-00, Canada: Federal Court; see also *Zhu v Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No 1251, 2001 FCT 884, Canada: Federal Court.

‘applicants were persecuted by virtue of their being “trafficked”, regardless of their initial consent to resort to an agent’.¹⁶¹

Whilst these cases concerned boy applicants, the principles posed by the court, namely that the consent of the victims should not have a negative impact on the case, is valid in most trafficking cases for female applicants as well. In *Liv*, the court adopted a human rights approach as it considered that it could not be concluded that the victims had provided their consent to the journey proposed by traffickers given their young age as per the standards set out in the CRC. The court referred the case back to the Immigration and Refugee Board for a redetermination of the facts ‘taking into account the values reflected in international human rights law as aids to help inform the contextual approach to interpretation of the definition of the Convention’.¹⁶² In this context, references to external human rights norms have been conducive to a rather protective understanding of the terms of the 1951 Convention.

Similar views have been expressed in the jurisprudence examined in Australia,¹⁶³ the United Kingdom,¹⁶⁴ France,¹⁶⁵ the United States¹⁶⁶ whereby the harm arising out of the risk of being trafficked or re-trafficked would easily rise to the level of persecution. In these cases, the human rights narrative constituted a convenient approach because it clearly identified violations of basic protection standards. However, more complex situations in which the claimants are not likely to be re-trafficked (either because they can benefit from state protection or because they have been trafficked in a different place than their place of origin) have raised more uncertainty.

¹⁶¹ *Li v Canada (Minister of Citizenship and Immigration)*, [2000] IMM-932-00, Canada: Federal Court at [23].

¹⁶² *Ibid* at [27].

¹⁶³ *Case no NO3/47757 RRTA 355* (11 May 2004). *VXAJ v Minister for Immigration and Another* [2006] FMCA 234 (20 April 2006); *Case No. 0903290*, [2009] RRTA 727 (4 August 2009).

¹⁶⁴ *AM and BM (Trafficked women) Albania v Secretary of State for the Home Department*, [2010] UKUT 80 (IAC) 18 March 2010.

¹⁶⁵ CNDA, 24 Mars 2015, n°10012810, *Mlle J.E. F.*; CNDA, 29 Avril 2011, n°10012810; CNDA, 12 Juillet 2012, n°11026228; CNDA, 29 Avril 2011, *Melle E.*, n°10012810.

¹⁶⁶ *Matter of O-*, CGRS Case No 275 (Russia), (Board of Immigration Appeal 2003) cited in Kairo (n 157), 12.

iii- Inconsistent approaches regarding the peripheral harms surrounding the trafficking experience

Whilst international guidance indicates that a variety of factors should be taken into consideration for adjudicating claims of trafficking victims, the jurisprudence has remained inconsistent in considering these elements.

Some decisions in the UK followed a narrow line of analysis, by simply assessing the level of safety that the former victims could face upon return to their country.¹⁶⁷ For instance, the Upper Tribunal recently rejected a Vietnamese claimant who was trafficked from Vietnam to Hungary and sexually exploited. The tribunal concluded that:

‘Vietnam is a large country of some 90 million people with a number of large cities in it. If the appellant were able to return, a matter to which we shall have to return, she would not be a person of any adverse interest to the government, and the chance of coming across her traffickers is very slight’.¹⁶⁸

The court, however, did not assess other harms, such as the impact of a possible trauma,¹⁶⁹ or the risk of being ostracised or stigmatised. On another occasion, the Upper Tribunal also rejected the appeal application of a trafficking victim by considering that there was no real - risk of being re-trafficked and the claimant would have the opportunity to benefit from the protection of available shelters in her country.¹⁷⁰ In this case, the appeal authority did not consider that other forms of harm could impact the applicant’s daily life upon return,¹⁷¹ thus failing to engage in a more

¹⁶⁷ Inter alia, *VD (Trafficking) Albania v Secretary of State for the Home Department*, CG [2004] UKIAT 00115, 26 May 2004; *MP [Trafficking - Sufficiency of Protection] Romania v Secretary of State for the Home Department* [2005] UKIAT 00086, 21 April 2005; *NA (Kyrgyz Woman) Tajikistan v Secretary of State for the Home Department*, CG [2004] UKIAT 00133, 28 May 2004.

¹⁶⁸ *Nguyen (Anti-Trafficking Convention: respondent's duties) v. The Secretary of State for the Home Department* [2015] UKUT 00170 (IAC), 25 March 2015, at [51]

¹⁶⁹ Although in this case a medical report attesting to the fact that the applicant’s suffered from PTSD was produced.

¹⁷⁰ *PO (Trafficked Women) Nigeria v Secretary of State for the Home Department*, CG [2009] UKAIT 00046, 23 November 2009, at [212].

¹⁷¹ It was considered that an NGO could provide support for her trauma but further consideration would have been desirable regarding her chances of reintegration as a single mother with a child (presumably

circumstantial and holistic assessment of her circumstances. Fortunately, this restrictive approach was abandoned in *D (Trafficked women) Nigeria CG*¹⁷² as the tribunal conducted a detailed analysis of the claimant's individual circumstances by relying extensively on the UNHCR guidelines¹⁷³ for victims of trafficking and concluded that 'if the appellant is met by NAPTIP shelter on arrival in Nigeria [...] [although] she would not be at risk of being trafficked [...] she would in effect be locked up for the duration of her stay and only allowed out with a chaperone'. It was further stated that 'in this appellant's case such restriction on her movements would [...] cause significant re-traumatisation'.¹⁷⁴ The importance of the trauma faced, compounded by the lack of family support, was the basis for granting refugee status to this applicant. To reach this conclusion, the tribunal adopted a circumstantial approach by acknowledging 'the need for critical and close analysis of the particular personal circumstances of a victim of trafficking in the context of the evidenced background material'.¹⁷⁵ A rather similar view was adopted in the case of a Congolese applicant in the US as the decision makers accorded significant weight to the psychological harm faced by the applicant.¹⁷⁶

In light of the above, it can be observed that when decision makers take into account the psychological element for assessing the risk of persecution, the outcome tends to be positive for the applicants.¹⁷⁷ However, the risks of ostracism, stigma and alienation are rarely considered, which is

born out of her trafficking experience). She had no family network and had been subjected to child labour.

¹⁷² *D (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) October 2016.

¹⁷³ *Ibid* at [21].

¹⁷⁴ *Ibid* at [212].

¹⁷⁵ *Ibid* at [70].

¹⁷⁶ *Matter of X*, United States Executive Office for Immigration Review, 9 August 2011, available at: <http://www.refworld.org/cases,USIC,4ea6e2a62.html>; in this case, the psychiatrist who performed an evaluation in preparation for the hearing of the claimant before the Court determined that it would be 'highly detrimental' for her to return to her country because she had no family members who could provide her with emotional or financial support and returning her to the DRC would force her to relive her traumatic experiences, which would be very damaging, especially if she were not able to obtain mental health care (p.13). Given the nature of the respondent's past persecution and her particularly vulnerable position as a young woman with no familial connections and limited income, the Court found it very likely that she would suffer serious harm if removed to the DRC.

¹⁷⁷ *AM and BM (Trafficked women) Albania v Secretary of State for the Home Department*, [2010] UKUT 80 (IAC), March 2010: The Tribunal granted refugee status to a claimant acknowledging that victims of trafficking were likely to suffer PTSD syndromes that could affect their ability to reintegrate in the society.

an unfortunate approach because these aspects could further inform the interpretation of the notion of persecution. For instance, in Australia, in *Appeal No. 1105325*¹⁷⁸, the Appeal Tribunal rejected the asylum application of a Korean applicant who had gone to Australia to seek better opportunities but who was eventually forced to work in a brothel by her agent. The tribunal noted that the applicant had been unable to present a psychological report attesting to her fragile mental state and that she was not at serious risk of being re-trafficked. Her claim was therefore rejected. The tribunal then acknowledged that the claimant's 'family may have learned about her sex work and drug use in Australia, and, as a result, will reject her'. It was further stated that there was a 'possibility that such knowledge may reach her family, and that they may disapprove or even reject her because of that activity'¹⁷⁹. However, the tribunal concluded that such a reaction or rejection would not amount to 'serious harm'.¹⁸⁰ While the mere fact of being rejected by one's family might not indeed amount to persecution, the evaluation of this element would have required a more thorough examination of her various circumstances. In particular, the claimant's ability to meet her needs alone in Korea and the potential ostracism that she could face without family support could have also been assessed to reach a more transparent conclusion. Foster pointed out that, for instance, 'a trafficked woman may face isolation from traditional support networks, leading to destitution, which may itself constitute persecution'.¹⁸¹ This aspect was not sufficiently taken into consideration in this case.

Conversely to the above, a recent evolution has been noted in France in such cases. In some trafficking cases, the appeal court has taken into account not only the risk to applicants of being re-trafficked and facing reprisals, but also the possibility of 'social alienation',¹⁸² ostracism from the family and community as well as discrimination.¹⁸³ This has led to more positive outcomes for applicants. In certain traditional and paternalistic

¹⁷⁸ *Case No. 1105325* [2012] RRTA 272 (20 March 2012).

¹⁷⁹ *Ibid* at [75].

¹⁸⁰ *Ibid* at [75].

¹⁸¹ Dorevitch and Foster (n 142) 2.

¹⁸² CNDA, 24 March 2015, Décision n° 10012810, *Mlle JEL*.

¹⁸³ CNDA, 12 juillet 2013 n° 13003859, 4.

societies where a family or community network is essential, the position that the victim of trafficking will have in her society upon return might indeed be important in order to assess the level of harm that she could face.

A singular approach pertaining to mental harm is the one adopted in the US, whereby an applicant can be granted asylum if her past experience has been deemed particularly atrocious, even when no prospective risk of physical harm is identified.¹⁸⁴ In this sense, the US legislator has introduced the possibility to recognise an applicant for ‘compelling reasons’ based on past persecution.¹⁸⁵ UNHCR considers, that in extreme cases, forms of mental suffering could amount to persecution when the extremely fragile psychological state of mind of the applicants could render their return to the country unendurable.¹⁸⁶ Gauci distinguished this aspect from the concept of ‘continuing persecution’¹⁸⁷ caused by a trauma that makes an applicant more vulnerable to other forms of harm such as the ability to reintegrate into the society. This is different to considering the trauma itself as a form of mental persecution, as suggested by the UNHCR guidelines. Whilst the difference is slight, this option has rarely been adopted by national courts, save for the US. This unfortunately demonstrates the reluctance of domestic jurisdictions to accept mental harm as a form of persecution per se as courts usually require that applicants also demonstrate a risk of facing other forms predicament in addition to the trauma experienced.

iv-Concluding remarks

Apart from the above-mentioned cases, the previously discussed decisions generally fail to consider the individual circumstances of the trafficked claimants, their role in the society as well as the stigmatisation, isolation and ostracism that they could face upon return to their country. A strict interpretation of persecution would only assess the risk of experiencing continuous instances of trafficking while a broader understanding of the

¹⁸⁴ *Matter of Chen*, 20 I&N Dec 16 (Board of Immigration Appeal 1989) and *Matter of B-*, 21 I&N Dec 66 (Board of Immigration Appeal 1995).

¹⁸⁵ Title 8 Code of Federal Regulations, para 208.13(b)(1)(iii)(A).

¹⁸⁶ UNHCR (n 49) at [16].

¹⁸⁷ Jean-Pierre Gauci, *Trafficked Persons as Refugees*, (King’s College London 2013) 224-225.

notion, which is more desirable in these cases, would take into account an accumulation of different elements and the adverse impact that they have on the physical and psychological integrity of the claimants. In particular, Kneebone pointed out that the phenomenon of trafficking reveals the deficiencies of certain social systems whereby some women are in a position of vulnerability.¹⁸⁸ These aspects are important elements that need to be evaluated in order to adopt a more holistic approach to persecution so as to facilitate a better understanding of this notion in trafficking cases.

Part 3- Concluding remarks

This chapter has analysed how new claims arising out of situations of gender-based violence, often perpetrated in the private sphere, have been addressed in the jurisprudence. Whilst some jurisdictions have been quite reluctant to consider that private individuals could be agents of persecution, this position has progressively evolved, making the notion of persecution more relevant to the claims of refugee women in the 21st century. Regrettably, the interpretation of the various forms of harm that non-state agents of persecution can cause still raises dissension because gender-based persecution cases are usually complex and involve a wide array of harms that are inconsistently taken into account. Whilst acts of physical violence such as FGM, domestic violence and trafficking in persons are generally found to amount to persecution, ‘milder’ forms of violence peripheral to those harms are more variably addressed, causing a ‘degree of uncertainty about how to approach matters in which issues of gender and refugee law intersect’.¹⁸⁹ This state of the jurisprudence led Kallinosis to speak again of a ‘refugee roulette’¹⁹⁰ for the ‘refugee woman’ and tend to set an undesirably high threshold.

¹⁸⁸ Susan Kneebone, ‘Human Trafficking and Refugee Women’ in Efrat Arbel, Catherin Dauvergne, Jenni Millbank (eds) *Gender in Refugee Law - From the Margins to the Centre* (Routledge 2014) 197-219.

¹⁸⁹ Kneebone (n 3).

¹⁹⁰ Kallinosis (n 24) 80.

Overall, inconsistent approaches are partly due to the fact that different interpretive patterns have been used by decision makers as observed in this chapter. It appears that most common-law jurisdictions have often relied on human rights as interpretive benchmarks for assessing the notion of persecution but they have done so through divergent parameters. Other jurisdictions have adopted ad hoc narratives, on a case-by-case basis, thus creating further uncertainty for asylum seekers and refugees. More consistency should be, therefore, fostered in national jurisdictions in order to provide decisions that are better adapted to the protection needs of refugees. For this, a holistic assessment of the different circumstances of refugee women should be conducted, taking into account the complexity of their experiences in both the public and private spheres and recognising that both spheres, in fact, closely intersect.

In this sense Crawley called for a ‘contextual analysis [of refugee claims] that includes gender relations and gender equality and moves beyond discrete monolithic categories of men and women that flatten out the complexity and diversity of experience’.¹⁹¹ An absolute harmonisation of jurisprudential practices is rather difficult to achieve, but lending more weight to the personal circumstances of refugees and their individual profile for interpreting persecution could encourage fairer and more transparent outcomes and reassert the relevance of the notion of persecution in these cases.

The preceding chapters have explored the relevance of the notion of persecution in various types of claims that generally involve individual forms of harm. It was concluded that persecution remains relevant in most cases, only if a holistic and comprehensive method is adopted, factoring in a circumstantial approach. The following and final chapter will now assess the limits of the concept of persecution in cases of generalised forms of hardship in order to delineate the confines of the 1951 Convention.

¹⁹¹ Crawley (n 10) 348.

Chapter 6: The limitations of the notion of persecution and collective forms of harm

The previous chapters have demonstrated that the notion of persecution is a relatively malleable notion that remains relevant to a large variety of situation, generally involving personal forms of harm. However, the application of the notion of persecution to asylum cases involving collective forms of predicaments poses different conceptual challenges that will be analysed below. These forms of harm have become more frequent in the past decades and have brought to light some of the inherent limitations of the concept of persecution, thus questioning the ‘enduring relevance’ of the Convention.¹ As a result, one might wonder to what extent the notion of persecution is applicable in contemporary contexts of collective hardship?

The first part of this chapter will highlight the main interpretive difficulties for applying the notion of persecution to certain types of mass displacement. It will then be observed that multiple national systems have flourished in response to these conceptual challenges, leading to a fragmentary state of refugee law at the global level. In particular, it will be pointed out that this situation questions the centrality of ‘persecution’ in the refugee definition. It will be argued that the complementary forms of protection and extended definitions have unduly encroached on the 1951 Convention although the Convention should remain applicable to a large number of cases, even in situations of mass displacement (Part 1). The second part will consider the limitations of the notion of persecution. It will be argued that a change of paradigm is not needed to reshape the notion of refugeehood at the international level because the 1951 Convention corresponds to one form of protection that might not suit all forms of displacements worldwide (Part 2).

¹ Jane McAdam, ‘The Enduring Relevance of the 1951 Refugee Convention’ [2017] 29 *International Journal of Refugee Law* 1.

Part 1) The 1951 Convention vs extended definitions and complementary forms of protection: a fragmentary system of protection for individuals fleeing collective forms of harm

The present section will first highlight the new interpretive challenges brought to light in contexts of large-scale displacement or generalised violence (A). It will be then demonstrated that these challenges have been circumvented by domestic legislations through the implementation of complementary protection regimes or extended definitions. Different state approaches will be analysed with a particular focus on the complementary protection scheme provided by the QD, given that it constitutes the first attempt to harmonise approaches at the transnational level. It will be then argued that, generally, the development of these complementary protection schemes by host states has been inconsistent and inadequate. In addition to that, the parallel use of extended definitions has further contributed to the creation of an imbalance system of protection (B).

A) Generalised forms of violence and large-scale displacements

i-Patterns of displacement that challenge the notion of persecution

As pointed out in chapter 1, new forms of displacement have emerged since the end of the Cold War. Some of these new displacement patterns are distinct from the ‘classical persecution-driven movements’,² in particular due to the absence of individualised harm that generally ensues. In these contexts, people are often facing the indirect consequences of certain situations rather than targeted forms of persecution as noted by some authors.

For instance, Feller fleshed out the existence of three new categories of forced displacement relating to generalised forms of harm, namely ‘violence accompanying conflicts or civil disturbance’, ‘natural disasters or

² Erika Feller, ‘The Refugee Convention at 60: Still Fit for Its Purpose? Protection Tools for Protection Needs’ in Susan Kneebone, Dallal Stevens, Loretta Baldassar (eds) *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge Research in Asylum, Migration and Refugee Law 2015).

human-made calamities’ and mixed situations involving individuals who move for various reasons, including poverty.³ Betts also highlighted the emergence of similar drivers, such as ‘environmental change, food insecurity, and state fragility’.⁴ In particular, he pointed to the severity of the situations faced by these new migrants, who are forced to leave their country to ensure their economic survival, rather than fleeing one specific agent of harm. He therefore called these new drivers, ‘survival migration’.⁵ On a different note, Lambert and Farell noted the existence of emerging push-factors, in the context of what they called the ‘new wars’.⁶ They considered that these wars are distinct from traditional conflicts in that they involve a larger variety of actors and have wider repercussions on large segments of civilian populations.⁷ They explained that such conflicts usually involve ‘a broad range of military actors, including insurgents, militias and criminals, as well as state-based military forces’, thus enhancing the complexity and magnitude of the violence, indirectly affecting civilians. Farell and Schmitt made the same observations and spoke of an ‘excess death’ rate to designate the large amount of people ‘killed [...] indirectly by the effects of conflict on population displacement, food insecurity and ill-health’.⁸ They observed that ‘far more civilians die as an indirect consequence of armed conflict, than directly in armed conflict itself’.⁹ The above authors all pointed to the existence of new categories of displacement prompted by the indirect consequences of external events on civilian populations and different from the targeted forms of violence usually encompassed by the notion of the persecution.

These emerging forms of harm have been acknowledged by the UNHCR, who observed that ‘poverty, economic decline, inflation, violence,

³ Ibid.

⁴ Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press 2013) 15.

⁵ Ibid.

⁶ Hélène Lambert and Theo Farell, ‘Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ [2010] 22 *International Journal of Refugee Law* 237, 257.

⁷ Ibid 258.

⁸ Theo Farell and Olivier Schmitt, ‘The Causes, Character and Conduct of Armed Conflicts and the Effects on Civilian Populations, 1990-2010’ [2012] 03 *Legal and Protection Policy and Research Series UNHCR DIP* 1-44, 7.

⁹ Ibid 10.

disease, food insecurity and malnourishment¹⁰ were new major drivers in the 21st century. This position was later reiterated by the Refugee Agency through one of its representatives, who lamented the indirect effects of armed conflicts and generalised violence on civilians.¹¹ He pointed out that sizable segments of populations could be now concerned by these situations, which raises major challenges for differentiating individuals in need of international protection from individuals merely leaving to seek a better life.

Due to the mixed and overlapping motives of displacements induced by state fragility, armed conflict, economic deprivation, climate change or environmental changes, statistics regarding the number of those displaced and the exact causes of displacement are extremely difficult to gather.¹² It is particularly difficult to address the existence of mixed flows¹³ involving people fleeing a wide variety of complex and entangled predicaments ranging from economic harm to threat to physical insecurity and environmental damage, as there is no common metric by which to measure the severity of these types of harm. In this context, interpreting the notion of persecution is highly challenging for a few reasons that will be analysed in turn.

ii-Interpretive challenges

As demonstrated in preceding chapters, the notion of persecution implies the existence of some form of individual treatment inflicted upon certain individuals.¹⁴ In a Note on International Protection in 1998, the UNHCR pointed out that ‘persecution always involves some form of discrimination’.¹⁵ Whilst this element has been debated in previous chapters,

¹⁰ UNHCR, ‘Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa’ (UNHCR December 2012).

¹¹ Volker Türk, ‘Protection Gaps in Europe? Persons fleeing the indiscriminate effects of generalized violence’, (UNHCR 2011) 4.

¹² The UNHCR estimated that in 2016, 65.6 millions of individuals were forcibly displaced. This figure, however, encompasses a wide variety of drivers referred to as ‘persecution, conflict, violation or human rights violations’. This includes therefore, refugees, but also IDPs, stateless persons and returnees. UNHCR, Global Trend, Forced Displacement 2016, 19 June 2017.

¹³ Feller (n 2).

¹⁴ See chapter 3, Part 2 (B).

¹⁵ UNHCR Standing Committee, Note on International Protection Note on International Protection EC/48/SC/CRP.27, 25 May 1998. See also Chapter 2, whereby numerous authors argued that discrimination is an essential, although not sufficient, element of the notion of persecution.

it remains that persecution implies the necessity to target an individual or a group for a specific characteristic that they have (either for personal motivation or other discriminatory reasons).¹⁶ As a result, the Refugee Agency recently stated that the 1951 Convention should not apply to those ‘fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no element of persecution’.¹⁷ This particular aspect of persecution therefore poses interpretive difficulties when applied to generalised forms of violence and other human rights violations that seemingly engender unselective predicaments as is often the case, for instance, during armed conflicts. In this sense, the UNHCR Handbook considered that ‘war refugees’ should be treated as a ‘special case’¹⁸ because they do not fit easily within the criteria of ‘well-founded fear of persecution’. War refugees arguably escape a general situation of instability rather than targeted harm perpetrated by one or several people and as such, have difficulties in demonstrating that they have faced persecution.

Another major feature of the notion of persecution lies in its necessary human agency. The previous chapters have analysed cases of individuals who have experienced harm at the hands of either state or non-state agents. All these cases had in common the existence of a human persecutor. The possibility that persecution could stem from a general situation without identifiable agent of harm was not considered in the *travaux préparatoires* of

¹⁶ See authors who have argued that persecution supposes an action that targets people for their actual or perceived characteristics: Jean-Francois Durieux, ‘Three Asylum Paradigms’ [2013] 20 International Journal on Minority and Group Rights 147, 157; Daniel J. Steinbock, ‘Interpreting the Refugee Definition’ [1998] 45 UCLA Law Review 733; Andrew I. Schoenholtz, ‘The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century’ [2015] 16 Chicago Journal of International Law 8, 120; Mirko Bagaric and Penny Dimopoulos, ‘Discrimination as the Touchstone of Persecution in Refugee Law’ [2007] 3 Journal of Migration and Refugee Issues 14. For a different perspective see: in Jean-Yves Carlier, ‘The Geneva Refugee Definition and the ‘Theory of the Three Scales’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 37-54, the author considers that persecution consists more in the disproportionate violations of human rights than discrimination.

¹⁷ UNHCR, The UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (Brussels, 12 September 2001, COM (2001) 510 final, 2001/0207 (CNS), 1 November 2001, [42].

¹⁸ UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV.3. at Chapter V.

the 1951 Convention and neither is it featured in the UNHCR Handbook¹⁹ or any other interpretive guidelines. This suggests that a human actor of persecution remains necessary in every case and poses challenges for determining the protection needs of people who are fleeing external situations. For instance, this is particularly problematic in the case of individuals fearing economic harm. Indeed, the Handbook noted that the 1951 Convention was not meant to cover economic migrants²⁰ unless they can prove having faced intentional harm as a result of discriminatory policies. Although the UNHCR Handbook establishes a certain nuance to this approach by considering that in certain situations, economic measures can amount to acts of persecution, it highlighted the difficulty of addressing these cases in the terms of the Convention. Harding,²¹ in particular, pointed out that it is generally hard to identify those responsible for the economic suffering of entire populations, which in turn makes it difficult to apply the concept of persecution. To Harding, this situation is, to a great extent, what feeds the migrants/refugees dichotomy as it causes refugees to be viewed with more sympathy than people escaping poverty,²² given that the latter are generally perceived to move by choice. Other authors pointed out that the lack of a human persecutor and the lack of targeted action was also problematic in the cases of individuals fleeing climate change or environmental disasters because it is difficult to ascribe responsibility for these types of predicaments. In particular, Ni noted that it is ultimately ‘difficult to fit climate change into the persecutor mold.’²³

Whether the notion of persecution can fit into the situations described above has been widely questioned by countries in which people seek asylum. In order to respond to such situations, some states have eschewed the

¹⁹ Ibid, [65]. The UNHCR Handbook pointed out that persecution normally relates to acts perpetrated by the authorities of a country or by the local populace thus pointing out that some form of conscious or intentional action by a person is required.

²⁰ Ibid 62-64.

²¹ Jeremy Harding, *The Uninvited: Refugees at the Rich Man's Gate* (Profile Books 2000). For Harding refugees generally attract greater international sympathy than economic migrants because there is an identifiable persecutor, as opposed to a general degree of economic difficulty that prevails in some parts of the world.

²² Ibid.

²³ Xing-Yin Ni, ‘A Nation Going Under: Legal Protection for “Climate Change Refugees”’ [2015] 38 Boston College International & Comparative Law Review 329, 339.

interpretive problem by either resorting to complementary forms of protection or extending the benefit of the Convention to wider categories of populations. Unfortunately, responses have been provided in an uncoordinated manner and, in certain cases, have reflected restrictive interpretations of the refugee definition, as well as a certain misunderstanding of the scope of persecution.

B) The fragmentary responses of the international community to individuals displaced by generalised violence and other human rights violations

i-Complementary protection and extended refugee definitions: a fragmentary system of protection?

Some countries in Africa and Latin America have reshaped the notion of a refugee by adding broader criteria to the refugee definition in order to adapt it to new displacement patterns. A new definition was first developed in 1969 in Africa by the Convention Governing the Specific Aspects of Refugee Problems in Africa taken under the auspices of the Organisation of African Unity (the OAU Convention).²⁴ The OAU Convention adopted the 1951 Convention definition as a departure point to determine who is a refugee and further enlarged the eligibility criteria by considering that the mere existence of situations such as ‘external aggression, occupation, foreign domination or events seriously disturbing public order’ could warrant international protection. In 1984, the Cartagena Declaration on Refugees (‘Cartagena Declaration’)²⁵ adopted a similar narrative and added new elements to the causes of flight, namely ‘generalized violence’, ‘internal aggression’, and ‘massive violation of human rights’. Both definitions developed a new refugee paradigm by referring to objective conditions in refugee-producing countries and ruling out the concept of persecution.²⁶

²⁴ OAU Convention Governing the Specific Aspects of Refugee Problems (concluded at Addis Ababa on 10 September 1969, registered on 31 March 1976) 1001 UNTS 45 (OAU Convention).

²⁵ Cartagena Declaration on Refugees, (adopted on 22 November 1984) OAS Doc. OEA/Ser.L/V/II.66/doc.10, 190 (Cartagena Declaration).

²⁶ José H. Fischel De Andrade, ‘Regional Policy Approaches and Harmonization: a Latin American Perspective’ [1998] 10 International Journal of Refugee Law 389, 402.

After the emergence of new regional approaches, the UNHCR acknowledged the particularity of certain local situations and commended such developments.²⁷ Although the Refugee Agency re-affirmed that the 1951 definition remained the foundation of international refugee law, it also considered that other forms of protection were needed to respond to the needs and priorities of newly displaced people.²⁸ In order to remedy the lack of international legislation covering situations of generalised violence in other countries, the UNHCR issued a number of recommendations and guidance notes to encourage states to respect, at a minimum, the principle of non-refoulement,²⁹ even for individuals who were not eligible to refugee status under the 1951 definition.

In spite of these new situations of generalised violence, most industrialised states continued to apply the traditional definition of a refugee. In these countries, the notion of persecution remained a pivotal concept in the determination of refugee status and claimants at risk of indiscriminate or general forms of harms tended to be rejected under the 1951 Convention.³⁰ In lieu of an extended definition, national systems created complementary forms of protection³¹ to address the plight of these ‘new refugees’. They, however, adopted differentiated standards to determine who was eligible to protected status.

²⁷ ExCom Conclusion No 81 (XLVIII) ‘General Conclusion on International Protection’ – 1997: ‘The Executive Committee [...] (k) Encourages States and UNHCR to continue to promote, where relevant, regional initiatives for refugee protection and durable solutions, and to ensure that regional standards which are developed conform fully with universally recognized standards and respond to particular regional circumstances and protection needs’.

²⁸ UNHCR ExCom Conclusion No. 87 (L) ‘General Conclusion on International Protection’ – 1999 (f) Reaffirms ‘that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime; recognises, however, that there may be a need to develop complementary forms of protection, and in this context, encourages UNHCR to engage in consultations with States and relevant actors to examine all aspects of this issue’; Excom Conclusion No. 103 (LVI) ‘General Conclusion on International Protection’ – 2005 – Provision on International Protection Including Through Complementary Forms of Protection [...] the Excom recognises: ‘Recognizing that, in different contexts, there may be a need for international protection in cases not addressed by the 1951 Convention and its 1967 Protocol’.

²⁹ UNHCR Excom Conclusions No 87 (L) ‘General Conclusion on International Protection’ (1999); UNHCR Excom Conclusions No 89 (LI) ‘General Conclusion on International Protection’ (from 2000 UNHCR Excom meeting) (2000); UNHCR Excom Conclusions No. 103 (LVI) ‘Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection’ (2005).

³⁰ Hugo Storey, ‘Armed Conflict in Asylum Law: The “War-Flaw”’ [2012] 31 Refugee Survey Quarterly 1, 5.

Storey highlighted the existence of a ‘first wave’ of jurisprudence, in the late 1990s in Western Europe.

³¹ Jane McAdam, *Complementary Protection in International Refugee Law* (1st edn OUP 2007) 1.

For instance, in the US, complementary protection takes the form of a temporary status granted to people who face a threat to their safety in their country, either because of an armed conflict, environmental disasters or if there ‘exist extraordinary and temporary conditions in the foreign state’ that could justify such protection.³² Protection seekers could also apply for withholding of removal under the CAT.³³ In Canada, legal status is afforded to individuals deemed ‘in need of protection’ if they can demonstrate that they are at risk of torture or cruel and inhuman treatment upon return.³⁴ In Australia, a protection visa can be granted to individuals likely to face ‘significant harm’ in their country; ‘significant harm’ being defined as arbitrary deprivation of life, the death penalty, torture, cruel, inhuman or degrading treatment or punishment.³⁵ Further, in New Zealand protected status is also given if there are substantial grounds for believing that individuals would be in danger of being subject to torture³⁶ or arbitrary deprivation of life or cruel treatment³⁷ in their place of origin. Finally, the European Union also developed a ‘subsidiary protection’ system in Article 15 of the QD, stating that protection can be provided to people at risk of facing serious harm upon return to their country, namely (a) the death penalty, (b) torture or inhuman or degrading treatment or punishment or (c) a serious and individual threat to someone’s life due to indiscriminate violence in situations of international or non-international armed conflicts.³⁸ For countries that have not developed specific schemes of protection, the customary principle of non-refoulement³⁹ under international human rights law⁴⁰ and European law⁴¹

³² The US Code of Law [1254] a L.114-19 (1)B.

³³ Immigration and Nationality Act (INA), Section 241(b)(3).

³⁴ The Immigration and Refugee Protection Act 2001 (c.27) 97.1 (A) (B).

³⁵ The Migration Act 1958 (No 62) 36 (2A).

³⁶ The Immigration Act 2009, S130.

³⁷ Ibid, S131.

³⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Article 15(c).

³⁹ UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1954/93, 31 January 1994. See also doctrinal approach: Daniel Bethlehem and Elihu Lauterpacht, ‘The Scope and Content of the Principle of Non-Refoulement. Opinion’ in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) at [253].

⁴⁰ See inter alia, Article 7 ICCPR, Article 22 CAT.

⁴¹ Art. 3 ECHR.

remains applicable to prevent forcible returns of persons at risk of facing certain types of human rights violations in their country.

The multiplicity of these different standards reflects a considerable splintering of the international protection schemes. The differentiation of protective statuses under extended refugee definitions, complementary regimes of protection and other human rights obligations, further reinforces the fragmentation of this system at the global level. In the words of Cantor and Durieux, ‘ad hoc-ism’⁴² now prevails on the international scene.

ii-An imbalanced system of protection at the global level?

As a result of this splintered system, the same category of people seeking protection can receive different answers depending on the country they lodge an asylum application to. This situation has been particularly detrimental for individuals escaping from armed conflicts and other forms of human rights violations. What follows will demonstrate how these inconsistent standards are applied in particular situations.

ii-(a) Armed conflicts

Although armed conflicts per se are not mentioned in the extended refugee definitions, they can easily be covered under the OAU definition (‘external aggression, occupation, foreign domination or events seriously disturbing public order’)⁴³ and the Cartagena Declaration (‘generalized violence, foreign aggression, internal conflicts, massive violation of human rights’).⁴⁴ The mere existence of a situation of instability as described above will suffice to grant refugee status without any other major other requirement. This rather broad scope of the OAU Convention and Cartagena Declaration

⁴² David James Cantor and Jean-François Durieux, ‘Refuge from Inhumanity? Canvassing the Issues’ in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2013) 3-35, 20.

⁴³ OAU Convention, art 1(2).

⁴⁴ Cartagena Declaration, pt III (3).

was pointed out by some authors such as Wood,⁴⁵ Rankin,⁴⁶ Simeon⁴⁷, Cantor and Trimino.⁴⁸ They all demonstrated that these definitions were able to cover a wide spectrum of violent events without a strict condition of intensity, thus seemingly setting a low threshold for the recognition of people fleeing armed conflicts. On this point, it should, however, be noted that few RSD decisions have been made under the extended definitions, in particular under the OAU Convention, as it has been mostly applied through *prima facie* procedures.⁴⁹ There is also a significant lack of doctrinal analysis of these definitions.⁵⁰ This could suggest that interpretive barriers have, so far, been overlooked. In this sense, Edwards pointed out that the wide coverage of the OAU definition owes more to a certain political will and wide interpretation of its terms than to its intrinsic scope.⁵¹ Whilst it is possible that broad interpretations of the regional definitions, motivated by local necessities, have allowed a generous application of these definitions, it cannot be denied that, by referring to external situations rather than individual circumstances of refugees, these definitions have a greater potential for being applied to large scale movements of people escaping armed conflicts.⁵²

⁴⁵ Tamara Wood, 'The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition' in David James Cantor and Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2013) 179-203, 179. Wood noted that the OAU definition is said to 'better reflect and respond to situations of mass displacement from civil war and other forms of violence, conflict and unrest that have characterised much of the forced migration on the African continent'.

⁴⁶ Micah Bond Rankin, 'Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on' [2005] New Issues in Refugee Research UNHCR Working Paper No. 113, 1-29, at 21. Rankin argued that the OAU can apply to a large set of situations, including mere 'disturbance and tensions' ranging from armed violence and violence of a lower threshold.

⁴⁷ James C. Simeon, 'A New Protection Orientation and Framework for Refugees and Other Forced Migrants' [2017] 6 *Laws* 1, 9; he calls these definitions the 'most progressive and advanced'.

⁴⁸ David James Cantor and Diana Trimiño Mora, 'A Simple Solution to War Refugees? The Latin American Expanded Definition and its relationship to IHL' in David James Cantor and Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2013) 204-224, 216-217.

⁴⁹ Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition' [2014] 26 *International Journal of Refugee Law* 555, 561-574: the author considered the poor implementation of the OAU Convention in South Africa and Kenya; Alice Edwards, 'Refugee Status Determination in Africa' [2006] 14 *African Journal of International and Comparative Law* 204, 205. See also Feller (n 2).

⁵⁰ Wood (n 45) 182. In Rankin (n 46) 4, the authors consider that there is an 'illusion of consensus' on the OAU Convention 4; see also Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions' [2012] 58 *McGill Law Journal* 95, 99.

⁵¹ Edwards (n 49) 232.

⁵² Vincent Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in A. Clapham & P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, (Oxford, Oxford University Press August 12, 2013) 700-734, 725: to Chetail, the regional definitions are "ultimately less convoluted and more protective".

Conversely, the approaches of states applying other forms of complementary protection have been more restrictive and, also, rather inconsistent. Canadian,⁵³ New Zealand,⁵⁴ and Australian⁵⁵ legislations have not specifically mentioned armed conflict as a basis for protection but instead referred to the dispositions of the CAT, therefore requiring a different test to assess the likelihood of harm. This test is more based on the individual circumstances of protection seekers rather than external factors and, as such, has a higher evidentiary burden than the extended definitions.⁵⁶ However, in Europe⁵⁷ and in the US,⁵⁸ direct references to armed conflicts are expressed in the legislation as a ground justifying the application of protection schemes. In spite of references to external situations, these legislations seem to impose an even stricter requirement given the necessity to qualify an external situation as an ‘armed conflict’ prior to determining the merits of the claim, which seems to also add an extra burden of proof on claimants.

The QD in particular adopted ambiguous terms in Article 15(c), by using contradictory concepts such as individual threats and indiscriminate violence in situations of armed conflict. Turk pointed out that this formulation was ‘convoluted’ and noted that the ‘individual threat’ element in a context of generalised violence presents a conceptual difficulty.⁵⁹ The terms used by the QD in fact seem to prompt an analysis that is akin to the notion of persecution and somehow blurs the distinction between the 1951 Convention and subsidiary protection criteria. For instance, Juss noted that the necessity to show a discriminate impact of indiscriminate violence, ‘is every bit as real as individual-based persecution’.⁶⁰ As such, the QD creates some conceptual confusion as to the perimeters of the 1951 Convention and subsidiary protection.

⁵³ The Immigration and Refugee Protection Act 2001(c.27) 97.1 (A) (B).

⁵⁴ The Immigration Act 2009, s 130 and 131.

⁵⁵ The Migration Act 1958 (No 62) 36 (2A). Jane McAdam (n 31), 252.

⁵⁶ McAdam (n 31) Chap 3 127: McAdam explained the various procedural requirements when seeking protection under international human rights law of complementary scheme of protection. For instance, she pointed that the standard of proof to establish a risk under the CAT in the US is “more likely than not” which is higher than “reasonably possibility”.

⁵⁷ Revised Qualification Directive, art 15 (c).

⁵⁸ 8 The U.S. Code of Law para 1254a L.114-19 (1)B 1(A).

⁵⁹ Turk, (n 10).

⁶⁰ Satvinder Juss, ‘Problematizing the Protection of “War Refugees”’: A Rejoinder to Hugo Storey and Jean-François Durieux’ [2013] 32 Refugee Survey Quarterly 122,132.

In order to overcome these interpretive hurdles, the CJEU was asked to provide advice on how to interpret Article 15(c) of the QD.⁶¹ However, the court provided rather confusing guidance in *Elgafaji*, as the European judges proposed to rely on a sliding scale to evaluate the level of harm faced by the claimants. For the court, the more an asylum seeker is personally affected by a situation of violence in his/her country, the lower the level of indiscriminate violence required in order to qualify for subsidiary protection.⁶² Lambert noted that, in this case, the court raised ‘two key issues of procedure: how to assess conflict severity and the seriousness of risks to individuals’ but did not provide any answer to these questions.⁶³ Indeed, the judges did not explain how the threshold of an individual threat versus the level of indiscriminate violence should be assessed, and therefore reinforced the confusion as to the practical application of those two contradictory concepts.

Another caveat of *Elgafaji*, is that it did not clarify whether the notion of armed conflict should be understood as the traditional armed conflict concept defined in IHL.⁶⁴ Fortunately, a later decision of court⁶⁵ further addressed this point, and specified that recourse to IHL standards was not necessary for qualifying the existence of an armed conflict. The court then provided its own understanding of the eligibility criteria for engaging the application of Article 15(c) by stating that an armed conflict exists ‘if a state’s armed forces confront one or more armed groups or if two or more armed groups confront each other’.⁶⁶ Whilst this decision has been welcomed as broadening the scope of the subsidiary protection regime,⁶⁷ its repercussions on EU case law need to be further assessed in the future to ensure that the

⁶¹ Case C-465/07 *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921 (CJEU, 17 February 2009).

⁶² *Ibid* at [39].

⁶³ Hélène Lambert, ‘The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence’ [2013] 25 *International Journal of Refugee Law* 207, 214.

⁶⁴ Although it should be noted that this question was not directly asked to the court.

⁶⁵ *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, C-285/12, (CJEU, 30 January 2014).

⁶⁶ *Ibid* at [25]. This view is in line with Juss’s proposal to consider apply a sui generis approach to Article 15 (c) in Juss (n 60).

⁶⁷ Celine Bauloz, ‘The Definition of Internal Armed Conflict in Asylum Law: The 2014 *Diakite* Judgment of the EU Court of Justice’ [2014] 12 *Journal of International Criminal Justice* 835, 844.

autonomous meaning of armed conflict proposed by the court does not lead to fragmentary jurisprudence in the EU.

Overall, it appears that, so far, the guidance provided by the court has been of limited assistance in harmonising the different approaches in Europe, in particular in the context of the refugee influx to the continent, starting in 2014. The European Asylum Support Office (EASO) reported that the interpretation of the notion of subsidiary protection has been uneven amongst member states. For instance, the EASO noted significant disparities in the type of status provided to Afghans in 2016, with a recognition rate varying between 2% and 97% depending on the country of asylum.⁶⁸ In France, close to 75% and in Italy more than 90% of cases obtained subsidiary protection whilst Germany barely granted any subsidiary protection.⁶⁹ The Syrian caseload also reflected inconsistent approaches. For example, Spain provided subsidiary protection to close to 100% of applicants whilst the UK instead granted refugee status to around 90% of Syrian applicants, barely resorting to subsidiary protection.⁷⁰ Whilst the EASO acknowledged that a certain disparity of profiles could explain such discrepancies, the organisation also raised concerns regarding the divergent interpretations of the criteria for international protection in the European Union.⁷¹

In light of the foregoing, it can be observed that different regimes are applied today for the protection of individuals fleeing armed conflicts, depending on the country they seek asylum in.

ii-(b) Other human rights violations

Other causes of displacement referring to various types of human rights violations have been also addressed through complementary protection schemes and extended definitions in inconsistent manners. Although Chetail considered that ‘human rights law [...] remains the most clear-cut avenue for

⁶⁸ Annual Report on the Situation of Asylum in the European Union 2016, European Asylum Support Office (EASO) (Publication Office, 2017) 48.

⁶⁹ Ibid.

⁷⁰ Ibid 44.

⁷¹ Ibid 26.

compensating the restrictive interpretation of the Refugee Convention',⁷² different normative standards have been relied upon and have further undermined the coherence of the international asylum regime. For instance, the US considered that environmental disasters⁷³ could constitute a ground for protection per se, whilst this is not the case for other countries. The death penalty is mentioned in the European and Australian legislations only but is absent from the other jurisdictions mentioned above. Similarly, 'arbitrary deprivation of life'⁷⁴ is only a ground for protection in Australia but not anywhere else. Almost all of the countries, however, rely on the notion of 'torture'⁷⁵ or 'inhuman or degrading treatment'⁷⁶ save for the US which mentions instead 'environmental disasters' or 'extraordinary and temporary conditions in a foreign country' thus rather focusing on external situations. To Goodwin-Gill, these schemes indeed represent 'selective domestic implementation(s) of State's international obligations',⁷⁷ thus causing considerable disparities at the international level.⁷⁸ The narrow definitions of the above regimes further contrast with the broader formulations of the OAU and Cartagena Declaration which have a better potential to encompass certain groups of individuals barely covered by national legislations of Western countries.⁷⁹ It can be, therefore, observed that people fleeing various forms of

⁷² Chetail (n 52) 725.

⁷³ 8 The US Code of Law para 1254a L.114-19 (1)B 1(A).

⁷⁴ Australia: The Migration Act 1958 (No 62) 36 (2A). New Zealand: The Immigration Act 2009, S 130.

⁷⁵ Canada: The Immigration and Refugee Protection Act 2001 (c.27) 97.1 (A) (B). Australia: The Migration Act 1958 (No 62) 36 (2A). New Zealand: The Immigration Act 2009, S 130. European Union: Article 15b of the European Parliament and Council Directive 2011/95/EU of 13 December 2011.

⁷⁶ Canada: The Immigration and Refugee Protection Act 2001 (c.27) 97.1 (A) (B). Australia: The Migration Act 1958 (No 62) 36 (2A). New Zealand: The Immigration Act 2009, S 130. European Union: Article 15b of the European Parliament and Council Directive 2011/95/EU of 13 December 2011.

⁷⁷ Ibid 333.

⁷⁸ Jane McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' [2005] 17 International Journal of Refugee Law 461, 493: as observed by McAdams, in the absence of a universal system to harmonise practices, there is an unfortunate 'splintering of the concept of international protection' through the existence of 'differentiated statuses and unprotected categories'. McAdam also demonstrated that the concept of 'inhuman or degrading treatment or punishment' can encompass various scenarios such as the situation of a 'father who suffered, and continues to 'suffer, distress and anguish as a result of the disappearance of his two sons' or 'denial of insufficient provision of basic services necessary for a dignified existence, including access to health, shelter, social security, and the education and protection of children, provided that a minimum level of severity is met'. For non-refoulement obligations of countries party to the ECHR, the test is even higher. It must amount to 'flagrant denial' of certain rights. In McAdam (n 31) 142-143 and 171.

⁷⁹ However, there is still a significant lack of interpretive doctrine, thus bringing some uncertainty as to whether or not these treaties can be applied broadly. See Jane McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards' Legal and Protection

human rights violation are also faced with great uncertainty when seeking protection at the international level.⁸⁰

It is evident from the above that inconsistent regimes are applied for the protection of people fleeing armed conflicts and other human rights violations, not only between legal systems relying on extended definitions and complementary protections, but also within the complementary systems of protection themselves. The following section will demonstrate that this general lack of harmonisation has unfortunately allowed states to use the complementary protection criteria in an extensive manner, to the detriment of the 1951 Convention. This, in fact, has questioned the relevance of the Refugee Convention and its ability to foster a coherent system of protection globally.

Part 2) The persecution paradigm in international refugee law: need for a change?

The present section will argue that the extended definitions and the complementary protection schemes described above have unduly encroached on the regime of the 1951 Convention. It will be first examined how the notion of persecution can be interpreted in contexts of mass displacement and other forms of human rights violations in order to argue that a proper understanding of persecution can ensure the relevance of the 1951 Convention even in such situations (A). The limitations of the notion of persecution will then be examined, only to conclude that amending the Convention to develop a new refugee paradigm is currently not needed, as long as a suitable application of the diverse forms of protection is ensured (B).

Policy Research Series, (UNHCR Department of International Protection, May 2011) 15: McAdam made reference to Edwards and noted that countries parties to the OAU have generally granted protection to individuals fleeing climate change but have not made reference to the disposition of the OAU. For her, 'this is significant because the explanation a State gives for acting in a particular way is relevant to ascertaining whether it supports or rejects a liberal interpretation of the treaty'.

⁸⁰ For complementary protection system see: Goodwin-Gill Guy and Jane McAdam, *The Refugee in International Law*, (3rd edn, OUP 2011) 330. Goodwin-Gill and McAdam stated that the 'nature, duration and application' of these multiple forms of complementary protections 'vary considerably amongst States' thus reflecting different practices.

A) The application of the notion of persecution to large-scale displacements and other forms of human rights violations

i- Persecution as a cornerstone of the refugee protection system

Authors have observed that extended definitions or complementary forms of protection have either encroached on the international refugee definition or serve as an excuse for states to deny protection to individuals who might have, otherwise, been eligible to refugee status. For instance, Turk stated that ‘with the emergence of [...] supplementary legal categories, some refugees who would otherwise fulfil the criteria of the 1951 Convention are being instead subsumed under the broader category’.⁸¹ He further pointed out that ‘an even greater concern is that some persons we would consider refugees do not receive any protection at all’.⁸² Whilst he noted that this issue is particularly concerning in Europe, this concern could be generalised to other regions. For instance, Storey made the same observations regarding the general situation of individuals fleeing armed conflict everywhere in the world, as he contended that both the extended definitions and complementary protection schemes have been detrimental to war refugees. For him, the existence of various interpretive approaches has led to a fragmentary state of the protection regime for persons fleeing armed conflict and has raised some uncertainty regarding their legal status.⁸³

It should be pointed out that, since the end of the cold war and before the advent of all the current complementary protection schemes, Western states had already applied very restrictive interpretations of the 1951 Convention in situations of large-scale displacement and generalised violence.⁸⁴ UNHCR observed in 1999 a ‘worrying tendency on the part of

⁸¹ Turk (n 11) 8.

⁸² Ibid. On restrictive interpretations of complementary protection criteria from states see also Naomi Hart, ‘Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom?’ [2016] 28 International Journal of Refugee law 171.

⁸³ Hugo Storey, ‘The “War-Flaw” and Why it Matters’ in David James Cantor and Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2013) 39-56, 40.

⁸⁴ Walter Kalin, ‘Flight in Times of War’ [2001] 83 International Review of the Red Cross 629, 635 - 642; Stéphane Jaquemet, ‘Expanding Refugee Protection through International Humanitarian Law-Driving on a Highway or Walking near the Edge of the Abyss?’ in David James Cantor and Jean-

some states [...] to argue [...] that the 1951 Convention offers an increasingly inadequate framework to address present-day refugee challenges'.⁸⁵ Indeed, the existence of mass influx seemed to have acted as a political deterrent for states to adopt an broad interpretation of the Convention⁸⁶ in an early period. As such, these narrow views cannot be attributed to the emergence of complementary protections schemes only. It remains that these schemes have failed to encourage states to adopt a wider understanding of the 1951 Convention, and, at times, have even served as an excuse for them not to do so.

In particular, Storey lamented the existence of a 'first wave' of jurisprudence that considered people escaping from armed conflict as falling outside the ambit of the 1951 Convention, unless they could demonstrate an element of persecution through the existence of a 'differential' treatment.⁸⁷ Storey termed this approach, the 'exceptionality approach',⁸⁸ characterising the 'war-flaw'⁸⁹ of the Convention. Hathaway also pointed to the misconception of certain decisions makers, who required applicants to have been effectively singled out in the past for ill-treatment in order to be eligible to refugee status.⁹⁰ In particular, he noted that this view was inadequate as nothing in the refugee definition prevents its application to large groups of people, regardless of the existence of past persecution. In fact, he considered

Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2013) 79-98, 83; Eric Fripp, 'Inclusion of Refugees from Armed Conflict, Combatants and Ex-combatants' in *ibid* 128-154, 134. See, for instance, jurisprudence where the 1951 Convention was applied in a restrictive manner: France: CNDA 31 Mars 2011 *Mr. A* N.100013192: the CNDA stated that the alleged acts of violence against a Somali claimant of a minority clan were not established and that nothing enabled the Court to believe that the applicant would face persecution. Although it was accepted that the claimant was from a minority clan, he was granted subsidiary protection; *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia v. Secretary of State for the Home Department*, CG [2011] UKUT 00445 (IAC), 25 November 2011: a similar reasoning was applied for Appellant F in this case.

⁸⁵ Director of UNHCR February 1999 quoted in Jaquemet, *ibid* 83.

⁸⁶ Fripp (n 84). See also Hart (81): Hart argues that states have interpreted complementary protection schemes in a rather narrow manner in order to avoid providing comparatively broader protection than other states and receiving disproportionate numbers of protection seekers.

⁸⁷ Hugo Storey, 'Armed Conflict in Asylum Law: The "War-Flaw"', [2012] 31 *Refugee Survey Quarterly* 1, 6.

⁸⁸ *Ibid* 4. He pointed out that this had been encouraged by the Handbook in 1979. This was exemplified in Secretary of State for the Home Department, *Ex Part Adan* [1998] UKHL 15.

⁸⁹ *Ibid*.

⁹⁰ James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, (2nd edn; CUP 2014) 174. See also UNHCR, Guidelines on International Protection No 12, Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions, 2 December 2012, HCR/GIP/16/12 at [17].

that individuals fleeing en masse might still be eligible to refugee status, even if they had not been individually affected by any harm because, in these cases, the experiences of similarly situated persons could be indicative of a risk of individual persecution.⁹¹ For both Hathaway and Storey, the refusal to accept that group persecution could warrant protection under the 1951 Convention was misplaced and, although Storey observed some positive evolution in that sense, he regretted that the case law remains very fragmentary.⁹² Unfortunately, narrow interpretations of all the claims, potentially affecting large portions of a population, generally prevail in some jurisdictions. For instance, gender-based violence, which could concern very large groups of people, has often been mistakenly⁹³ considered to fall outside the realm of the 1951 Convention, and countries have regrettably tended to grant complementary protection to the victims, rather than to grant refugee status.⁹⁴

To resolve these concerns, the UNHCR⁹⁵ has affirmed several times the centrality of the 1951 Convention and its capacity to apply in situations of large scale displacements. Indeed, in many circumstances, it is in fact possible to identify a discriminatory pattern of harm caused by certain agents of persecution. A closer look at some specific cases will demonstrate that the 1951 Convention is sufficiently flexible and able to cover individuals fleeing en masse and/or other human rights violations if a sufficiently broad understanding of the notion is adopted.

For instance, Edwards demonstrated that the 1951 Convention remains relevant in most situations of large-scale displacement in Africa. For

⁹¹ Ibid 174.

⁹² Storey (n 87) 9.

⁹³ Refer to Chapter 5.

⁹⁴ Jamie Chai Yun Liew, 'Taking It Personally: Delimiting Gender-Based Refugee Claims Using the Complementary Protection Provision in Canada', [2014] 26 Canadian Journal of Women and the Law 300; Hana Cheikh Ali, Christel Querton and Elodie Soulard, *Gender-related Claims in Europe: Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU member states* (Directorate General for Internal Policies, Policy department C: Citizens' rights and Constitutional Affairs, European Parliament, 2012) 46.

⁹⁵ Inter alia, UNHCR, 'The 1951 Convention Relating to the Status of Refugees: Its Relevance in the Contemporary Context', 1 February 1999 at [7]; UNHCR ExCom Conclusion No. 87 (L) – 1999 (f) Reaffirms 'that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime'; UNHCR Guidelines on International Protection No. 12 (2012) *ibid* (89) at [9], [45], [87].

her, the refugee definition can encompass a wide range of cases⁹⁶ through a liberal interpretation of its provisions. In particular, she pointed out that ‘forced displacement, serious restrictions on freedom of movement, armed attacks, violence, and other serious human rights violations, constitute forms of persecution protected by the 1951 Convention’.⁹⁷ She also argued that the increased polarisation and sectarian nature of violence in Africa often falls within at least one of the five Convention grounds. As a result, individuals fleeing tensions, disturbances, conflicts or general instability in the African continent might be covered by the terms of the refugee definition. Fortin made similar observations with regards to the application of the Cartagena Declaration. He noted more specifically that, whilst the Declaration considered that ‘massive violations of human rights’ would warrant international protection, such violations are almost always perpetrated for a Convention reason.⁹⁸ As a result, the victims of such human rights violations might as well easily be granted refugee status under the 1951 Convention.

It could also be pointed out that Fortin’s observations appear valid for individual human rights violations in the form of torture or inhuman or degrading treatment as referred to in various systems of complementary protection adopted in countries in the global north. Indeed, the infliction of such harms can often amount to persecution given the high degree of suffering caused. In many cases, it might be possible to attach these forms of harm to a Convention ground, in particular when referring to the existence of ‘imputed’ reasons. The UNHCR, for instance, considered that in most situations, the types of threats that are enumerated under the European subsidiary protection scheme, ‘indicate a strong presumption for Convention refugee status’.⁹⁹

⁹⁶ Alice Edwards, “Refugee Status Determination in Africa” [2006] 14 *African Journal of International and Comparative Law* 204, 232.

⁹⁷ *Ibid* 231.

⁹⁸ Antonio Fortin, ‘Doctrinal Review of the Broader Refugee Definition Contained in the Cartagena Declaration’ in *Memoria del Vigésimo Aniversario de la Declaración de Cartagena sobre los Refugiados (1984–2004)* 273–306, 295.

⁹⁹ UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection’ (12 September 2001) 14109/01 ASILE 54 at [42].

Authors have also argued that the notion of persecution is applicable to the specific context of armed conflict contrary to what has been advanced by certain countries. In particular, Storey demonstrated that the 1951 Convention is relevant in cases of displacements occurring as a result of armed conflict.¹⁰⁰ Similarly, Durieux agreed that persecution can occur both in peace and in war time, including in situations of generalised violence and, as a result, the existence of an armed conflict should simply be treated as ‘contextual’, or ‘neutral’.¹⁰¹ Durieux further explained his position by mentioning the example of Syria ‘in which the State [...] targets cities, or other geographic areas, that are deemed to be sympathetic to the opposition, hence ‘enemies of the State’.¹⁰² He argued that ‘to refer to this form of violence as indiscriminate would be an error, and typical Convention refugee notions, such as [...] persecution should suffice’.¹⁰³ He goes on to conclude that ‘a Convention refugee claim is hardly a matter of armed conflict – it is [primarily] a matter of fear of persecution’. Juss also supported his view by observing that Durieux’s position regarding the notion of persecution is ‘modern’ and ‘expansive’,¹⁰⁴ which is adequate for the protection of refugees fleeing armed conflict.

The view that persecution remains central to interpreting claims arising out of armed conflict was recently reiterated by the UNHCR.¹⁰⁵ For the Refugee Agency, the 1951 Convention should be the first instrument to consider for identifying protection needs. Only individuals, for whom no element of discriminatory violence exists, might be considered under complementary forms of protection. Turk, in fact, pointed out that the people who did not meet the 1951 Convention, would only be the ones targeted for ‘gratuitous or opportunistic violence’ or ‘persons who have no stake in an armed conflict or socio-economic-political order’ and who may ‘suffer the

¹⁰⁰ Storey (n 87) 9-13.

¹⁰¹ Jean-Francois Durieux, ‘Of War, Flows, Laws and Flaws: A Reply to Hugo Storey’ [2012] 31 *Refugee Survey Quarterly* 161, 163.

¹⁰² *Ibid* 166.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ UNHCR, ‘Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence’ (UNHCR 2011) 101; See also UNHCR (89).

consequences of targeted action'.¹⁰⁶ When an element of individual risk of violence can be noted in the harm endured, including through broader concepts of imputed characteristics, the application of the 1951 Convention appears therefore more adequate.

Whilst persecution should remain the cornerstone of the refugee definition, it cannot be denied that practical concerns can arise in situations of mass displacement. Indeed, authors¹⁰⁷ demonstrated that although the 1951 Convention applies doctrinally to these situations, it is procedurally difficult to assess individual claims of asylum seekers when they are displaced en masse. It could be, however, contended that this procedural aspect should not constitute a major obstacle to the application of the 1951 Convention in all cases. Whilst true, this consideration does not justify the tendency of some Western jurisdictions to over-rely on complementary protection schemes when they conduct refugee status determination through a judicial process, in particular in urban settings.

The emergence of complementary forms of protection has therefore raised concern with regard to the relevance of the 1951 Convention and the scope of the notion of persecution. These new types of protection were only supposed to cover residual caseloads of individuals who did not meet the criteria of the 1951 Convention. However, the interpretation of the 1951 criteria in situations of generalised violence has so far been quite inconsistent, restrictive and has reflected a certain misunderstanding of the scope of persecution. Whilst various interpretive frameworks to the notion of persecution have been assessed in the preceding chapters, such frameworks have, unfortunately, been less diligently applied in cases of generalised forms of harm. An adequate interpretation of persecution in these contexts should instead reaffirm the primacy of the 1951 Convention in order to avoid any *detournement* of the refugee definition and extensive applications of complementary schemes.

¹⁰⁶ Turk (n 11).

¹⁰⁷ Feller (n 2); Kalin (n 84) 637; Goodwin-Gill and McAdam (n 80) 335.

In order to overcome these interpretive problems, some authors have proposed to apply a principled approach in the particular case of people fleeing armed conflict. Scholars have particularly reflected on these situations because armed conflicts constitute some of the most contentious cases due to the large number of individuals that could potentially be granted refugee status and due to the arguable reluctance of national adjudicators to open a Pandora's box. Different views will be assessed below.

ii- The need for a principled approach tailored to the particular case of armed conflicts?

Population movements in situations of armed conflict, account for a considerable proportion of human displacements on the international scene. Yet, responses to the plight of 'war refugees' have been quite divergent and, as noted by Storey, the dominant human rights approach has not revealed itself to be sufficiently protective in these contexts.¹⁰⁸

In order to overcome such hurdles, Storey proposed a new approach for evaluating the claims of war refugees. Given the peculiar conditions of these individuals, he contended that rules of IHL should be the primary benchmarks for assessing persecution. Firstly, he pointed out that IHL is the *lex specialis* in situations of armed conflict and, thus, more adapted to the peculiar situations of individuals fleeing war.¹⁰⁹ Secondly, according to him, the fact that the jurisprudence has developed considerably in that field reinforces this proposal.¹¹⁰ He also provided concrete examples in order to illustrate his statements. In an earlier article, he and Wallace mentioned, for instance, the case of an armed conflict involving the use of chemical weapons. According to them, the claim of an individual who refuses to return to a country where he/she could be involved in a conflict where chemical weapons were used, in violation to IHL norms, would be more straightforwardly

¹⁰⁸ Storey (n 87) 13.

¹⁰⁹ Ibid 14.

¹¹⁰ Ibid 15.

adjudicated by considering IHL, rather than IHRL standards. They considered that: ‘it would be circuitous to analyse this assertion in human rights terms, when it is known that the use of chemical weapons is proscribed by several international humanitarian law treaties’.¹¹¹ Although Storey considers that IHL should be the main reference point for assessing the protection needs of individuals in the context of armed conflict, he does not entirely dismiss the relevance of IHRL as he considers that ‘if human rights law provides more extensive protection then it will be the correct law to apply’.¹¹² He, however, maintains that when ‘IHL provides the same level of protection then [persecution] should be analysed in IHL terms’,¹¹³ as a ‘primary reference point’.¹¹⁴

Conversely to what has been proposed by Storey, other scholars have argued against the application of IHL as a main source for interpreting the notion of persecution in the case of war refugees. For instance, Durieux¹¹⁵ considered that persecution may occur in many different circumstances and those circumstances should not be the ‘starting point’ of a refugee status determination process. The existence of an armed conflict is merely a contextual element that should not have a major bearing on the way we understand the refugee definition. Additionally, he argued that using IHL as a primary reference for interpreting persecution entails the inevitable risk of limiting the protection scope of the Convention.¹¹⁶ Therefore, he advocates a ‘non-exclusive, coordinated relationship between IHL, IHRL, and IRL’.¹¹⁷ In a similar manner to Durieux, Fripp also departed from Storey’s view by considering that IHL should not be the principal set of rules that ought to be referred to when interpreting refugee claims. He contended that referring to IHL norms is simply not in line with the rules of treaty interpretation whereby the Convention has a human rights object and purpose.¹¹⁸ He further observed

¹¹¹ Hugo Storey and Rebecca Wallace, ‘War and Peace in Refugee Law Jurisprudence’ [2001] 95 AJIL 349, 357.

¹¹² Ibid 31.

¹¹³ Ibid 31.

¹¹⁴ Storey (n 87) 18.

¹¹⁵ Durieux (n 101) 164.

¹¹⁶ Ibid 166.

¹¹⁷ Ibid 175.

¹¹⁸ Eric Fripp, ‘International Humanitarian Law and the Interpretation of “Persecution” in Article 1A(2) CSR51’ [2014] 26 International Journal of Refugee Law 382, 398.

that there was no mention of any of the 1949 Geneva Conventions on the rules of war in the preamble although they had already been adopted. In light of the above arguments, he concluded that IHL norms should not be used as primary sources of interpretation, even in the context of an armed conflict. He stated, however, that IHL could be considered ‘a *lex specialis* enhancing the interpretation of open-ended IHRL standards in appropriate circumstances’.¹¹⁹ Other authors have also expressed concern regarding the use of IHL as a mean of interpretation, stating that it can sometimes lead to a restrictive understanding of the notion of protection and more particularly of the notion of persecution. Holzer, for instance, considered that IHL should provide ‘interpretative guidance only if it enables an inclusive interpretation of the refugee definition and thereby strengthens refugee protection’.¹²⁰ Similarly, Chetail considered that because IHL provides, at times, minimal standards of protection, a complementary approach to the different branches of law should be rather adopted.¹²¹

The view that rules of IHL should not be used as the main referential standards for interpreting persecution was supported by the UNHCR in the guidelines related to situations of armed conflict and violence. In these guidelines, the Refugee Agency stated that ‘for the purposes of determining refugee status, the existence of violations of IHL can be informative but not determinative of whether a conduct amounts to persecution within the meaning of the 1951 Convention’.¹²² The UNHCR then proposed a different line of analysis to assess the notion of persecution in situations of armed violence whereby human rights references come as a starting point and IHL appears to be treated as a complementary means of interpretation.¹²³

In addition to the potentially limitative scope that IHL could have on the notion of persecution, it should be noted that the set of rules it provides is

¹¹⁹ Ibid 403.

¹²⁰ Vanessa Holzer, ‘Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insights from Customary International Humanitarian Law’ in David James Cantor and Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2013) 101-127, 107.

¹²¹ Chetail (n 52) 732-733.

¹²² UNHCR (n 89) at [15].

¹²³ Ibid at [11].

relatively narrow. Indeed, the idea that IHL could be used as a primary reference point for interpreting the refugee definition only to be departed from when IHRL is more protective, as suggested by Storey, seems to imply that IHL is sufficiently developed and can be applied in almost all circumstances of an armed conflict. However, it can be contended, here, that, in a number of cases, IHL is in fact less detailed than IHRL and does not constitute a sufficiently detailed framework of interpretation. Where IHL fails to address a particular situation, other approaches will need to be applied in order to fill this normative gap, even when those approaches are not more protective. This is the case, for instance, in situations of non-international armed conflicts (NIAC). Under IHL, Prisoners of War should not to be prosecuted for their participation in the hostilities when they are involved in an international armed conflict.¹²⁴ However, the Geneva Conventions on the rules of war do not entail such a restriction for prisoners who have been caught during the hostilities in a NIAC. Armed members of opposing groups do not enjoy the status of combatants. Although IHL protects them against murder, torture, humiliating or degrading treatment,¹²⁵ they might face criminal prosecution for the mere fact of taking up arms.¹²⁶ IHL does not offer particular guidance as to the acceptable standards for the trial of armed group members in a NIAC although it provides specific rules about their treatment in detention. In order to assess whether their prosecution amounts to persecution, it is necessary to refer to other interpretive means, such as, for instance, basic international human rights standards.¹²⁷ In this situation, IHRL applies but it can lead to the conclusion that the prosecution faced by the armed opponents does not amount to persecution and that they are not eligible for refugee status. In such circumstances, IHRL appears to be the relevant standard although it is not more protective than IHL. IHRL is, however, applied simply because it provides a more comprehensive answer to the situation of individuals fleeing armed conflicts than IHL. In this view, Matthews has acknowledged that ‘the

¹²⁴ Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949) 75 UNTS 135, art 87.

¹²⁵ Common Article 3 to the Four Geneva Conventions, 1949.

¹²⁶ Hannah Matthews, ‘The interaction between international human rights law and international humanitarian law: seeking the most effective protection for civilians in non-international armed conflicts’ [2013] 17 *The international Journal of Human Rights* 633, 685.

¹²⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Article 10.

protection offered to civilians under international human rights law is wider in scope than that of international humanitarian law in terms of the rights covered and depth of protection offered'.¹²⁸ In particular, in the context of NIAC, she stressed that IHL is sparse.¹²⁹ This points to the fact that recourse to other means of interpretation will be inevitable in certain situations to fill the gaps in IHL.

Holzer proposed a third approach that could be used for interpreting the claims of 'war refugees' and reconciles the above narratives. For her, 'careful attention must be paid to the individual circumstances of the case at hand'.¹³⁰ As such, she reminds us of the importance of the UNHCR's circumstantial approach even in situations of armed conflicts. The UNHCR repeated this view in its Guidelines on International Protection No. 12, by stating that, even though IHL could be considered relevant in evaluating the notion of persecution, ultimately, what amounts to persecution will 'depend on the circumstances of the individual, including the age, gender, opinions, health, feelings and psychological make-up of the applicant'.¹³¹ It remains therefore a matter a degree, which is assessed by factoring in a large variety of personal circumstances of the claimants.

Although inconsistent views have been expressed on the approach to be adopted for interpreting the notion of persecution in times of war, the above authors all rightly pointed to the necessity of relying on a specific and principled narrative in order to avoid inadequate and inconsistent interpretations. Indeed, it is necessary to ensure that the refugee definition be given its full meaning and that excessive recourse to complementary forms of protection do not undermine the relevance of the Convention. Most authors agree that IHL needs to be taken into consideration when adjudicating claims of individuals fleeing armed conflict as it adequately reflects the specificity of these situations and sheds light on what the cogent protection standards are. This should, however, be done through a flexible interpretive method that

¹²⁸ Matthews (n 126) 633.

¹²⁹ Ibid, 638.

¹³⁰ Holzer (n 120) 114.

¹³¹ UNHCR (n 89) [11].

takes into consideration different areas of international law as well as the individual circumstances of refugees as proposed by the UNHCR circumstantial approach.

In light of the foregoing, it can be concluded that a proper understanding of the notion of persecution in situations of armed conflict is needed in order to re-assert the primacy of the 1951 Convention and ensure that the concept of persecution is applied in a relevant manner, without unduly resorting to complementary protection schemes or other types of protection.

Although the 1951 refugee definition appears sufficiently flexible to be applied in many situations of armed conflict and other forms of generalised human rights violations as above demonstrated, it should be acknowledged that the notion of persecution entails certain intrinsic limitations that cannot be overcome even through an adequate and principled interpretation of the notion. These limitations will be assessed in the following section.

B) The limits of persecution and the need for a different refugee paradigm?

i-Inherent limitations to the notion of persecution

Although a proper interpretation of the notion of persecution can ensure that the 1951 Convention remains applicable in many cases of forced displacements, it should be reminded that the plenipotentiaries intended to set some limitations to the number of people entitled to receive international assistance. According to the UNHCR Handbook, the expression ‘owing to well-founded fear of being persecuted [...] makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster’.¹³² Indeed, as previously pointed out, the notion of persecution necessarily excludes some individuals from the protection scheme of the 1951 Convention by requiring, at a minimum, the existence of a human agent of persecution¹³³ and an intent to perpetrate an act that could

¹³² UNHCR (n 18) at [39].

¹³³ Ni (n 23) 338.

result in harmful consequences.¹³⁴ People fleeing general circumstances, external socio-economic conditions and climate change are therefore unlikely to be considered at risk of persecution, essentially because it is difficult to identify an agent of persecution who has an underlying intent to engage in such actions and/or to demonstrate that certain individuals are being particularly targeted. In this sense, Shacknove considered that persecution is ‘just one manifestation of the absence of physical security’,¹³⁵ which could also be impacted by threats to ‘vital [economic] subsistence, and natural calamities’.¹³⁶ He noted, however, that these threats cannot be encompassed by the persecution paradigm. Similarly, Betts noted that ‘environmental change, natural disaster, food insecurity, famine and drought, state fragility and collapse of livelihoods’¹³⁷ do not fit the notion of persecution but constitute major drivers of populations.

Although the above authors are right in pointing to the limitations of persecution, it should be noted that the refugee definition can remain applicable in some of the situations described above.¹³⁸ For instance, in cases of state fragility and economic breakdown, certain groups of the population, such as isolated women, members of minority clans or children might be disproportionately affected by the level of violence and, as a result, more vulnerable to abuse by different parties. These individuals are discriminately impacted by the action of identifiable agents of persecution, and therefore, depending on the threshold of harm experienced, might fall under the 1951 Convention. For others who merely experience the economic consequences of instability in their country, it is true that this possibility remains remote. Feller, for instance, noted that economic factors in themselves ‘were never intended to be addressed through refugee protection mechanisms’.¹³⁹ Overpopulation, lack of infrastructure, endemic corruption leading to slow development and reduced economic opportunities are indeed unlikely to be

¹³⁴ Andrew E. Shacknove, ‘Who Is a Refugee?’ [1985] 95 *Ethics* 274, 279: For him the 1951 Convention requires the commission of ‘violent acts one person perpetrates against another’.

¹³⁵ *Ibid* 279.

¹³⁶ *Ibid* 278.

¹³⁷ Betts (n 4) 13-14.

¹³⁸ UNHCR (n 18) [39]: Although the handbook excludes victims of famine or natural disaster, it mentions that these people can still be recognized if a well-founded fear of persecution is identifiable.

¹³⁹ Feller (n 2).

covered by the refugee definition. In these situations, Feller considered that the ‘1951 Convention is obviously not the answer’.¹⁴⁰

A particular interpretive challenge can also be noted with regard to people escaping climate-related problems. Cooper¹⁴¹ has argued that the notion of persecution is applicable in such cases as she considered that the ‘governments of the developed world’ can be viewed as persecuting affected populations.¹⁴² She indeed contended that governments have a major responsibility in the plight of ‘climate refugees’ as they refused to ‘commit their collective resources to fight global warming’.¹⁴³ Therefore, she believed that the notion of persecution could apply in such cases. However, her position remains quite marginal and has been rejected by most authors. In particular, McAdam deemed her arguments ‘unconvincing’ and maintained that the problem with climate change is to identify a persecutor.¹⁴⁴ In *Teitotia*, the New Zealand High Court examined the argument that individuals displaced due to climate change could claim asylum based on the 1951 Convention. The judges, however, rejected the idea that the international community could be seen as an agent of persecution as they considered that this assertion would ‘completely reverse the traditional refugee paradigm’ since the claimant would be ‘seeking refuge within the very countries that are allegedly persecuting him’.¹⁴⁵

Although the notion of persecution is hard to fit into the climate change narrative, there might be some hypothetical cases, whereby climate change and environmental disasters are used by governments or non-state actors to disproportionately target some groups. In such scenarios, it could be possible to apply the 1951 Convention.¹⁴⁶ These cases, however, appear

¹⁴⁰ Ibid.

¹⁴¹ Jessica B. Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’ [1998] 6 NYU Environmental Law Journal 480.

¹⁴² Ibid 520.

¹⁴³ Ibid.

¹⁴⁴ Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP 2012) 43.

¹⁴⁵ *Iona Teitotia v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (26 November 2013) at [55]. This rejection was confirmed by the Supreme Court in *Teitotia v Chief Executive of the Ministry of Business, Innovation and Employment* NZSC 107 (20 July 2015).

¹⁴⁶ Christopher M. Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’ [2004] 15 Colorado Journal of International Environmental Law and Policy 271, 274. See also Florian

limited as in many situations, the intent of human actors in inflicting some form of harm might be difficult to establish. For instance, McAdam mentioned that in most cases governments are willing to improve the situation of citizens in their own country.¹⁴⁷ Bush also pointed out that the notion of persecution is likely to be irrelevant in these situations because one ‘must possess a certain level of intent’¹⁴⁸ to harm people (or to engage in actions that result in harm) and, arguing that policies negatively impacting the environment are an indirect form of persecution would excessively stretch this notion.¹⁴⁹ Last but not least, it should be added that the large variety of profiles and experiences of people displaced by natural occurrences might call for different solutions and are not easily encompassed under one legal regime.¹⁵⁰

Although it has been demonstrated that the 1951 Convention is rather flexible and able to address the plight of certain categories of individuals fleeing general circumstances, it remains that a large proportion of people will be unable to demonstrate a risk of persecution in the type of situations described above. Whilst complementary protection schemes and extended definitions have been useful to extend protection to some of them, such forms of protection are rather inconsistently applied and raise legal uncertainty for protection seekers as previously noted. This begs the question whether, ultimately, a paradigm shift is needed to address the needs of all individuals who cannot sustain a reasonably ‘good’ life in their country of origin and who are not covered by the 1951 Convention.

ii- Need for a paradigm shift?

Authors have argued that the 1951 Convention is fundamentally flawed and that refugee protection should be extended to wider groups of

François Hoepfner, *L'évolution de la notion de réfugié*, Publication de la fondation Marangopoulos pour les droits de l'homme, (Série 18, Paris Pedone, 2014) 425 and Hathaway (n 90) 175.

¹⁴⁷ McAdam, (n 144) 45. See also Ni (n 23) 339.

¹⁴⁸ Brittan J. Bush, ‘Redefining Environmental Refugees’ [2013] 27 Georgetown Immigration Law Journal 553, 564.

¹⁴⁹ Ibid 566.

¹⁵⁰ McAdam (n 79) 11. McAdam laid out different typologies of ‘climate refugees’ involving, for instance, IDPs.

people. As such, various benchmarks have been proposed to better evaluate the protection needs of people, in lieu of the concept of persecution. Shacknove, for instance, considered that refugee status should be afforded to individuals whose basic needs are not protected by their own state. For him, the severing of a ‘minimal social bond’¹⁵¹ is what makes someone a refugee. He added that alienage should not be considered an eligibility criterion to determine refugee status because international assistance should be provided, whenever possible.¹⁵² On a different note, Betts argued that refugee protection should be extended to all ‘survival migrants’, namely to people who have escaped from their country not only because of a risk of persecution, but also due to an ‘existential threat for which they have no access to a domestic remedy or resolution’.¹⁵³

The above authors proposed to reshape the notion of refugeehood as they consider that persecution is too restrictive a concept to constitute the cornerstone of the refugee definition. However, practical concerns might be raised regarding such a paradigm shift. Durieux has contended that states which grant asylum have committed to protect refugees and admit them to their territory because their plight resonates with some fundamental values of the host society.¹⁵⁴ As such, he demonstrated that the delivery of international protection is determined by the ethical values of the aider rather than the actual protection needs of people. This, in fact, points to a deeply embedded understanding that states have of the concept of refugee protection, indicating that it will, most probably, be difficult to fundamentally alter the notion of refugeehood in the short run.

Whilst the difficulty of the task should not be considered an insurmountable obstacle, it nonetheless begs another question: is there any other way forward for guaranteeing sufficient protection to individuals in need of assistance and not falling under the protection scope of the 1951 Convention? The previous chapters have demonstrated that the notion of

¹⁵¹ Shacknove (n 134) 278.

¹⁵² Ibid 277.

¹⁵³ Betts (n 4) 23.

¹⁵⁴ Durieux (n 17) 157.

persecution, which is the cornerstone of the refugee definition, is a flexible notion that can make the 1951 Convention adaptable to the changing circumstances of refugees. It cannot be stretched to such an extent that any person compelled to leave their country of origin would be granted refugee status, but it nonetheless appears to be able to encompass the needs of a rather large number of people if an appropriate interpretation of the notion of persecution is made, as demonstrated in the present thesis. Indeed, the perceived restrictiveness of the Convention can be partly overcome by re-affirming its centrality and developing more principled and broader approaches to the notion of persecution.

For the remaining groups of people, some authors have argued that their protection needs might, in fact, require other responses than refugee protection. The protection afforded under refugee status ensures admission and progressive assimilation into a host country. Indeed, according to the 1951 Convention, refugees should receive treatment similar to the most favoured foreigners, with a possible view to being eventually naturalised.¹⁵⁵ It therefore sets an ‘incremental protection regime’.¹⁵⁶ According to some scholars, this kind of regime might not be suitable for all displaced people. For instance, Lister argued that temporary forms of protection and on-site help might be much more sustainable than incremental admission within a country granting asylum for people fleeing poverty, famine, climate change or natural disasters.¹⁵⁷ Other authors have also noted that, given the complexities of the plight of people facing environmental problems, admission into a host country is not the only form of protection that could be provided. Bush, for instance, pointed to the necessity of developing a new convention that would specifically distinguish between temporary and long-term protection. For her, this is justified by the fact that ‘climate refugees’ have different circumstances and that, therefore, it is important to differentiate those who have temporary protection needs from the ones who

¹⁵⁵ Ibid 156.

¹⁵⁶ Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio-Marín (eds), *Human Rights and Immigration* (OUP 2014) 19-72, 43.

¹⁵⁷ Matthew Lister, ‘Who are Refugees’ [2013] 32 *Law and Philosophy* 645, 660.

have more permanent problems.¹⁵⁸ From a different point of view, Ni noted that so-called environmental refugees do not all wish to be labelled refugees¹⁵⁹ as it diminishes their ‘adaptation efforts’¹⁶⁰ to overcome the adverse impacts of climate change. According to her, refugee protection addresses the concerns of only a small proportion of individuals displaced by climate change and is therefore not the right model.¹⁶¹ At the other end of the spectrum, Mayer considers that protection for ‘climate migrants’ differs from the protection offered to refugees in that it is clear from the outset that, for most of them, a permanent status is required. He contended that individuals forced to leave their place of origin because of environmental disasters are unlikely to be able to return home, unlike refugees who could reasonably expect that persecution will cease at some point in the future. In that sense, he recommends that naturalisation be immediately provided to climate migrants in the home country,¹⁶² instead of incremental integration.

The above authors pointed to the diversity of the protection needs of forcibly displaced people, whilst the Refugee Convention constitutes only one suitable answer for certain populations. This does not mean that asylum should be denied to anybody escaping indiscriminate harm. In some situations, complementary forms of protection, based on human rights standards, provide useful answers to protect people fleeing generalised violence and to correct certain limitations of the 1951 Convention. Whilst lacking some coherency, such systems of protection worldwide have the capability of providing a fairly decent protection scheme and ensuring that states evenly grant asylum to people in need. However, this can only be achieved if a sufficiently flexible and adequate interpretation of the notion of persecution is adopted in order to avoid the situation in which inconsistent complementary protection schemes unduly encroach upon the 1951 Convention or undermine its regime. As pointed out by Lister, a broad

¹⁵⁸ Bush (n 148) 574.

¹⁵⁹ Ni (n 23) 335-336.

¹⁶⁰ Ibid, 336.

¹⁶¹ Ibid 341.

¹⁶² Benoit Mayer, ‘The International Legal Challenges of “Climate induced” Migration: Proposal for an International Legal Framework’ [2011] 22 Colorado Journal of International Environmental Law and Policy 357, 390.

understanding of the 1951 Convention would be desirable to ensure its relevance in the 21st century.¹⁶³ Not only would it provide a more adequate protection scheme, but it also appears sufficiently in line with the intention of the plenipotentiaries who introduced the flexible notion of persecution into the refugee definition to make the Convention adaptable to the changing circumstances of refugees.

This is not to deny that, in the future, displacement patterns might continue to evolve and that eventually a paradigm shift might be needed. It appears, however, that the refugee definition of the 1951 Convention should not be considered a major obstacle to the delivery of protection as long as a proper interpretation of its terms, and in particular of the notion of persecution, is adopted.

Part 3- Conclusion

Whilst previous chapters have demonstrated that the notion of persecution can be interpreted in a flexible and evolutionary manner in order to make the 1951 Convention adaptable to the evolving needs of refugees who are at risk to face some form of individualised harm, the present chapter has shed some light on interpretive challenges arising out of situations of generalised violence and other external circumstances. Due to the large number of displaced people potentially concerned, recipient states have adopted rather conservative interpretations of the notion of persecution, and have instead implemented different protection schemes in these contexts. These protection schemes have taken the form of ‘extended definitions’ or ‘complementary protection’ and relied on divergent standards of protection, thus creating some legal uncertainty for protection seekers on the international scene. Further, their extensive application has reflected a certain misunderstanding of the scope of persecution and undermined the centrality of the Refugee Convention.

¹⁶³ Lister (n 157).

In light of this situation, it has been argued that the primacy of the refugee definition should be reaffirmed so that it remains applicable in many cases of generalised violence. Whilst the inherent limitations of the notion of persecution have also been fleshed out in these circumstances, it has been argued that a radical paradigm shift is not currently needed but that a broader and more consistent understanding of the notion of persecution would be more desirable, in particular by reasserting the importance of the circumstantial approach proposed by the UNHCR even in cases of collective forms of hardship. This has been exemplified through the development of interpretive frameworks applicable to the specific cases of armed conflict. Whilst most non-convention refugees could receive assistance under the complementary protection regimes, some cases such as economic migrants or ‘climate refugees’, seem to have other forms of protection needs that would be more adequately tackled through the development of separate instruments.

It is, however, beyond the purview of the present chapter to analyse the appropriate standards that should be developed in that regard. It remains that, as long as the international refugee definition can encompass the circumstances of the majority of forcibly displaced people, the 1951 Convention should remain the primary instrument for providing protection in order to ensure the overall coherence of the asylum system globally.

Conclusion

The present thesis has pointed out that the notion of persecution was considered the cornerstone of the 1951 Convention. However, the absence of a definition in international refugee law has created major risks of inconsistent interpretations, that have, in turn, led to variable applications of the Convention and questioned the relevance of this notion in certain cases.

Concerns of interpretation are, in fact, quite recent as, for a long period, the concept of persecution did not raise particular debate. In the aftermath of the WWII, persecution was almost always understood as a form of harm occurring in the public sphere, perpetrated by repressive states, persecuting members of the political opposition or minorities. Whilst scholars seemed to have always considered that persecution could take various forms beyond state repression, in practice the notion was almost always perceived as a political act. The way it was interpreted was in fact serving interests of recipient countries, viewing refugees as individuals who were voting with their feet to disavow their own state's officials and policies.

The interpretation of persecution, however, started raising contention in the past few decades when refugee claims progressively diversified and when people started claiming new forms of harm at the hands of non-state actors. Members of communities, members of the family, local or criminal groups came to the fore as possible agents of persecution, which had been not anticipated by the plenipotentiaries.

The present thesis observed that, at the end of the cold war polarity, national jurisdictions gradually moved away from a political application of the refugee definition and started interpreting its terms in a manner that better reflected contemporary concerns. Different legal approaches, influenced by grassroots human rights activism and the legal scholarship, had been adopted for applying the notion of persecution, thus giving rise to new methodologies

of interpretation. As principled approaches started being developed, it appeared that the application of the 1951 Convention entered a new judicial phase in the 1990s. However, these approaches emerged in a rather inconsistent manner, which shed some light on the difficulty in defining the meaning of persecution in contemporary contexts. In particular, persecution appeared to be a general and malleable concept, that could be variably interpreted through subjective views shaped by cultural, gender, religious or social influences. This led many authors to point out that persecution itself had tainted the international regime of refugee protection with a strong subjective bias, raising concerns of inadequate or inconsistent applications of refugee law.

The quest for the right meaning to the notion persecution has been both encouraged and challenged, in recent decades, by the continuing diversification of refugee situations and the surging number of displaced individuals on the international scene. The multiplicity of refugee profiles has, in particular, questioned the relevance of persecution in the 21st century and the necessity to interpret it in an evolutionary manner to ensure the ‘enduring relevance’¹ of the 1951 Convention. UNHCR expressed these concerns at the 60th anniversary of the Convention by stating that there were now significant ‘gaps in the scope of the existing refugee protection framework’.² It was noted that, today, numerous displaced individuals, in need of some form of assistance are often falling outside the ambit of the international protection regime, in particular because they have difficulties in demonstrating that they fit the persecution criteria. As a result, they are left without protection.

The present thesis has, therefore, attempted to assess whether these protection gaps could be overcome through an evolutionary understanding of the notion of persecution or whether a shift of paradigm is needed to adapt

¹ Jane McAdam, ‘The Enduring Relevance of the 1951 Refugee Convention’ [2017] 29 *International Journal of Refugee Law* 1.

² UNHCR, Background Paper, 2010 High Commissioner's Dialogue on Protection Challenges, ‘Protection Gaps and Challenges’, 22 November 2010, available at: <http://www.refworld.org/docid/4cef89242.html>.

the current refugee law regime to the protection needs of forcibly displaced people on the international scene.

In order to solve the risk of inconsistent and inadequate applications of the Convention, scholars have developed principled frameworks for interpreting persecution. The dominant one, as analysed in the present thesis, relies on basic human rights norms to define what persecution is. Human rights criticisms have, however, pointed to the rigidity of this approach, highlighting its unduly formalistic character. It has been also demonstrated, in some of the preceding chapters, that this paradigm, whilst providing objective benchmarks for interpretation, is not adequate for some cases because it fosters a compartmentalised assessment of persecution, at times obviating certain aspects of the harms experienced by refugees. This framework is opposed to a more holistic understanding of persecution, based on the personal circumstances of each individual as proposed by the UNHCR in its 'circumstantial approach'. Whilst the UNHCR's model requires a case-by-case analysis, and, as such, raises concerns of inconsistent and subjective interpretations, the refugee agency nonetheless proposed objective indicators to minimise such pitfalls by taking into account the individual circumstances of refugees.

In spite of the existence of theoretical models for interpreting the notion of persecution, the preceding chapters have observed that national jurisdictions have still not applied consistent methodologies of interpretation. Although some judges have formally acknowledged the relevance of basic human rights as adequate interpretive tools, most of them have, in practice, adopted variable modalities of interpretation. Whilst human rights have, to a certain extent, allowed for an evolutionary understanding of persecution, they have not abided by their promise to foster greater consistency in the international system of protection. Additionally, unduly restrictive interpretations of the notion of persecution have been noted in some cases, and in particular in cases of gender-related forms of harm. This is especially unfortunate given the increasing number of refugee women in the world today. As such, a fragmentary system of protection seems to have arisen on

the international scene, with the risk of undermining the coherence of the international refugee law regime, and creating both legal uncertainty and incentives for asylum shopping.

In order to fill these gaps, more coherence in interpreting the terms of the refugee definition, and in particular the notion of persecution, would be desirable, not only between jurisdictions but also within them. Attempts to define persecution have been met with little success,³ as defining this notion would most probably confer too much rigidity on the 1951 Convention. Given the constantly evolving circumstances of refugees, a flexible approach remains desirable, but consistent methodologies of interpretation should be adopted. Whilst the basic human rights model has proven to be useful, it should not be applied in a rigid manner. The UNHCR's proposal to complement this mode of interpretation with a more circumstantial approach appears to be both sufficiently principled and flexible in order to adapt to the evolving protection needs of refugees and adequately assess the thresholds of harm required to fall under the purview of the 1951 Convention. As pointed out by the Refugee Agency a 'balanced and holistic application of the definition, incorporating human rights law principles, has the best chance of yielding the correct result'.⁴

It should be, however, acknowledged that the notion of persecution has some inherent limitations that cannot be overcome without entirely contravening the initial intention of the plenipotentiaries. These limitations lie in the fact that, at a minimum, an individual form of harm⁵, perpetrated by an identifiable agent of persecution is usually needed to apply the concept of persecution. Generally, scholars have indeed agreed that human agency is a necessary requirement of the 1951 Convention.

³ UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV.3 at [51].

⁴ UNHCR, 'Note on The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', [2001] 20 Refugee Survey Quarterly 77.

⁵ Individual forms of harm can affect very large groups of population as long as individuals, or similarly situated individuals are being disproportionately at risk due to some real or perceived characteristics.

As a result, there are major challenges for applying persecution, in particular, in contexts of mass displacement occurring, for instance, in times of war or due to a general breakdown of the state structures and economy. In these situations, it could be difficult to identify one particular individual responsible for the harm of others or to distinguish specific groups at risk more than the rest of the population. Many countries have eschewed this interpretive difficulty and developed other types of complementary protection, without any effective coordination or harmonisation. Consequently, multiple standards are nowadays applied on the international scene resulting in a splintered system of asylum, or as one author expressed, in an ‘institutional schizophrenia’.⁶

It is true that the definition of the 1951 Convention makes it necessary to carry out an individual determination for refugee status, and therefore raises procedural challenges in situations of mass displacement, in particular in the contexts of refugee camps. Some alternative protection mechanisms might be needed in these circumstances in order to better fit the needs and resources of the host country. However, numerous individuals who are fleeing generalised forms of harm are also seeking asylum in urban or national settings where domestic jurisdictions have sufficient capacity to carry out individual refugee status determination procedures. In these circumstances, the interpretation of the notion of persecution remains a crucial matter. Unfortunately, as observed in the last chapter, states have too often ignored the refugee definition and instead applied complementary systems of protection (that generally provide fewer entitlements) or even denied assistance to asylum seekers, including in urban contexts.

The present thesis has argued that a proper understanding of the notion of persecution, based on a holistic approach, factoring in a human rights and circumstantial analysis as proposed by the UNHCR, would in fact cover a sufficiently broad number of people seeking assistance, even in cases of

⁶ In Durieux Jean-Francois, ‘Of War, Flows, Laws and Flaws: A Reply to Hugo Storey’ [2012] 31 Refugee Survey Quarterly 161, 176: the author stated that ‘the co-existence within the world-wide regime of both “refugee” and “non-refugee/subsidiary” definitions, covering in essence the same situations, induces a sort of institutional schizophrenia’.

generalised forms of harm or other human rights violations. Authors have, in particular, proposed models for interpreting persecution in situations of armed conflict. Whilst there has been a considerable debate on the modalities of these models, the existence of a principled approach in such circumstances is desirable because it would encourage more consistent applications of the refugee definition and avoid unduly restrictive applications of the 1951 Convention.

It remains, however, that the 1951 Convention is not able to ensure protection for all individuals in situations of forced displacement even through the application of an adequate interpretive framework. For instance, people fleeing general economic hardship, environmental disasters or climate change would still have difficulties in falling within the ambit of the Refugee Convention, and in particular within the criteria of persecution. It is true that in some cases, nature or economic rights are used as tools by humans to inflict harm upon others, thus as a means of persecution. In these circumstances, the 1951 Convention would then be still relevant. However, in most situations, it remains difficult to ascribe responsibility for these types of harm, and, hence the notion of persecution is unlikely to apply.

As a result, even though it has been argued that the notion of persecution has the ability to cover a wide array of people, a large number of them are still unprotected under the 1951 Convention. This begs the question as to whether or not a paradigm shift would eventually be needed to protect all people in need of assistance. To answer this concern, it was argued that refugee protection provides one specific type of protection, which can be called incremental integration and which fits well with certain humanitarian needs. It appears unreasonable to consider that one single convention or protection scheme would be sufficient to cover the situation of all displaced individuals on the international scene regardless of their profiles or experiences. Since the needs of displaced people might greatly differ depending on their circumstances, the application of differentiated protection schemes might therefore be more appropriate. This is in particular the case for people fleeing the lack of development in their country or environmental

disasters. They should indeed be afforded other forms of protection that better suit their situation whilst the 1951 Convention still has the ability to apply to a large number of individuals who are facing targeted forms of harm, either individually or in group.

As pointed out by one author, a ‘broad reading’⁷ of a (seemingly) narrow definition appears desirable because it allows for a broad application of the 1951 Convention, beyond the confines of the current states’ practices. It also clarifies the duties of states towards refugees and the nature of the assistance required. At this stage, therefore, the notion of persecution does not appear to be obsolete but still has the capacity to encompass a wide array of situations. In fact, it remains a flexible tool to adapt the 1951 Convention to the evolving needs of refugees in the 21st century and delineates its ambit in a reasonable and fair manner.

⁷ Matthew Lister, ‘Who are Refugees’ [2013] 32 Law and Philosophy 645, 671.

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